

***Final 2021 Nationwide Permit (NWP) Regional Conditions  
for the States of Nevada and Utah***  
*(Effective February 25, 2022 until March 14, 2026)*

**A. Regional Conditions for the States of Nevada and Utah:**

1. The permittee shall submit a pre-construction notification (PCN), in accordance with General Condition 32, in the following circumstances:

a. Activities involving new bank stabilization that do not incorporate bioengineering techniques. Bioengineering techniques include using live plants alone or in combination with dead or inorganic materials, including rock, sand, or gravel;

b. Activities resulting in a discharge of dredged or fill material in waters of the U.S. on Tribal Lands; and,

c. Activities involving the permanent channelization, realignment, or relocation of streams.

2. The use of NWPs 4, 5, 7, 12 - 15, 17, 18, 21 - 23, 25, 29 – 31, 33, 34, 39 - 51, 57, or 58, authorizing the discharge of dredged and/or fill material is prohibited:

a. in peatlands<sup>1</sup> containing histosols, including bogs and fens; and,

b. below the ordinary high-water mark of the Great Salt Lake containing bioherms (microbialites).

**B. 401 Water Quality Certification (401 WQC) Regional Conditions for Nevada:**

1. For NWPs 3, 5 – 7, 13, 14, 18 – 20, 23, 25, 27, 31 – 33, 36 – 38, 41, 45, 46 and 59, on **tribal lands within U.S. Environmental Protection Agency (EPA) Region 9<sup>2</sup> boundaries in the State of Nevada**, the permittee shall comply with all terms and conditions of the attached October 12, 2021, 401 WQC granted by the U.S. EPA, Region 9.

<sup>1</sup>A peatland is defined as a wetland with saturated organic soil (greater than or equal to 16 inches in thickness) that is classified as a histosol in the Natural Resources Conservation Service (NRCS) Field Indicators of Hydric Soils in the United States (Version 8.0, 2016). A copy of the document can be obtained from the NRCS at:  
[http://www.nrcs.usda.gov/Internet/ DOCUMENTS/nrcs142p2\\_053171.pdf](http://www.nrcs.usda.gov/Internet/DOCUMENTS/nrcs142p2_053171.pdf)

<sup>2</sup>EPA, Region 9 401 WQC does not apply to activities proceeding in the territories of the 25 tribes in Region 9 that have been approved as Section 401 certifying authorities – the Navajo Nation, Paiute-Shoshone of the Bishop Community, Big Pine Paiute-Shoshone Tribe, Twenty-Nine Palms Band of Mission Indians, Hoopa Valley Tribe, Hopi Tribe, Pyramid Lake Paiute Tribe, Dry Creek Rancheria of Pomo Indians, Pala Band of Mission Indians, Cortina Band of Wintun Indians, Walker River Paiute Tribe, Yerington Paiute, Duck Valley, Confederated Tribes of the Goshute Reservation, Gila River Indian Community, San Carlos Apache, Morongo Band of Mission Indians, Big Pine Paiute Tribe of Owen Valley, Rincon Band of Luiseno Indians, Cabazon, Quartz Valley, Karuk, White Mountain Apache Tribe, Table Mountain Rancheria, Resighini Rancheria, La Posta Band of Diegueno Mission Indians. In limited circumstances some lands within tribal boundaries fall outside a tribe's Section 401 certifying authority and are subject to this certification.

2. For NWP 43, on **tribal lands within U.S. Environmental Protection Agency (EPA) Region 9<sup>2</sup> boundaries in the State of Nevada**, the permittee shall comply with all terms and conditions of the attached December 11, 2020, 401 WQC granted by the U.S. EPA, Region 9.

**C. 401 Water Quality Certification (401 WQC) Regional Conditions for Utah:**

1. For all NWPs, except those that involve dam maintenance/rehabilitation or reservoir dewatering, on **non-tribal lands within the State of Utah**, the permittee shall comply with all terms and conditions of the attached December 8, 2020, 401 WQC granted by the State of Utah, Department of Environmental Quality.

2. For NWPs 3, 5 – 7, 13 – 15, 18 – 20, 23, 25, 27, 30 – 33, 36 – 38, 41, 45, 46, and 59, on **Indian country<sup>3</sup> in the State of Utah (except Indian country lands of the Navajo Nation and the Confederated Tribes of the Goshute Reservation)** the permittee shall comply with all terms and conditions of the attached October 12, 2021, 401 WQC granted by the U.S. EPA, Region 8.

3. For NWPs 3, 5 – 7, 13 – 15, 18 – 20, 23, 25, 27, 30 – 33, 36, 38, 41, 43, 45, 46, and 59, except NWPs applied “after-the-fact” (i.e., after the discharge has occurred) or to NWPs where a waiver on limits has been granted by the District or Division Engineer, on the **Ute Mountain Ute Reservation in the State of Utah**, the permittee shall comply with all terms and conditions of the attached December 14, 2020, 401 WQC granted by Ute Mountain Ute Tribe.

<sup>3</sup>Indian country in Utah generally includes: (1) lands within the exterior boundaries of the following Indian reservations located within Utah, in part or in full: the Goshute Reservation, the Navajo Indian Reservation, the reservation lands of the Paiute Indian Tribe of Utah (Cedar Band of Paiutes, Kanosh Band of Paiutes, Koosharem Band of Paiutes, Indian Peaks Band of Paiutes, and Shivwits Band of Paiutes), the Skull Valley Indian Reservation, the Uintah and Ouray Reservation (subject to federal court decisions removing certain lands from Indian country status within the Uintah and Ouray Reservation), and the Washakie Reservation; (2) any land held in trust by the United States for an Indian tribe; and (3) any other areas that are “Indian country” within the meaning of 18 U.S.C. section 1151.

# ATTACHMENTS

*401 Water Quality  
Certifications*



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
REGION IX  
75 Hawthorne Street  
San Francisco, CA 94105-3901

Colonel Antoinette Gant  
Division Engineer, South Pacific Division  
U.S. Army Corps of Engineers  
1455 Market Street  
San Francisco, CA 94103-1398

Subject: Clean Water Act, Section 401 Certification of the 41 proposed Nationwide Permits in the June 11, 2021 draft final rule for Tribal Lands within the Region 9 coverage area of the U.S. Environmental Protection Agency.

Dear Colonel Gant,

The U.S. Environmental Protection Agency Region 9 (EPA) has responsibility under Section 401 of the Clean Water Act (CWA) to evaluate and certify water quality protections for federal permits and licenses issued for work on tribal lands (40 C.F.R. 123.12(a)). EPA has reviewed the U.S. Army Corps of Engineers (Corps) CWA Section 404 Nation Wide Permits (NWP), including the regional conditions proposed for each South Pacific Division District and hereby transmit our water quality certification. The enclosed NWP conditions become binding requirements for activities on tribal lands within EPA Region 9 and will remain in effect for the authorization period of the 2021 NWPs.<sup>1,2</sup>

Please instruct your regulatory staff to provide this certification to anyone contacting the Corps with applicable projects. If a project fails to meet the enclosed conditions, the applicant must contact EPA Region 9 at **R9cwa401@epa.gov** for individual project-specific certifications, to schedule pre-filing meeting requests, or for any certification-related questions.

EPA appreciates our long-standing partnership and coordination in implementing Section 401 of the CWA. Please contact me at (415) 972-3337 or [torres.tomas@epa.gov](mailto:torres.tomas@epa.gov) should you have any questions, or


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<sup>1</sup> This water quality certification does not apply to activities proceeding in the territories of the 25 tribes in Region 9 that have been approved as Section 401 certifying authorities – the Navajo Nation, Paiute-Shoshone of the Bishop Community, Big Pine Paiute-Shoshone Tribe, Twenty-Nine Palms Band of Mission Indians, Hoopa Valley Tribe, Hopi Tribe, Pyramid Lake Paiute Tribe, Dry Creek Rancheria of Pomo Indians, Pala Band of Mission Indians, Cortina Band of Wintun Indians, Walker River Paiute Tribe, Yerington Paiute, Duck Valley, Confederated Tribes of the Goshute Reservation, Gila River Indian Community, San Carlos Apache, Morongo Band of Mission Indians, Big Pine Paiute Tribe of Owen Valley, Rincon Band of Luiseno Indians, Cabazon, Quartz Valley, Karuk, White Mountain Apache Tribe, Table Mountain Rancheria, Resighini Rancheria, La Posta Band of Diegueno Mission Indians. In limited circumstances some lands within tribal boundaries fall outside a tribe's Section 401 certifying authority and are subject to this certification.

<sup>2</sup> Consistent with the *EPA Policy on Consultation and Coordination with Indian Tribes*, EPA sent a letter dated September 2, 2021, offering to consult with the tribes in Region 9 on this certification. EPA did not receive any formal request for consultation or any written comments on the draft certification.

your staff may contact our Wetlands Section Manager, Sahrye Cohen at (415) 972-3523 or [cohen.sahrye@epa.gov](mailto:cohen.sahrye@epa.gov).

Sincerely,  
**TOMAS  
TORRES**  
Tomás Torres  
Director, Water Division

 Digitally signed by  
TOMAS TORRES  
Date: 2021.10.12  
13:49:49 -07'00'

Enclosure

cc:

All federally recognized Indian Tribes within EPA Region 9  
James Mazza, Regulatory Branch Chief, San Francisco District  
Michael Jewell, Regulatory Branch Chief, Sacramento District  
David Castanon, Regulatory Branch Chief, Los Angeles District  
Kelly Allen, Regulatory Branch Chief, New Mexico District  
Todd Tillinger, Corps South Pacific Division  
Trevor Baggione, Arizona Department of Environmental Quality  
Paul Hann, California State Water Resources Control Board  
Brigit Widegren, Nevada Division of Environmental Protection

## **Enclosure**

### **U.S. Environmental Protection Agency Region 9's Clean Water Act Section 401 Certification of the 41 Nationwide Permits (2021) on applicable Tribal Lands in California, Nevada, Arizona, and Navajo Allottee Lands**

This Clean Water Act (CWA) Section 401 water quality certification (WQC) applies to any potential point source discharges from potential projects authorized under the proposed re-issuance of the following U.S. Army Corps of Engineers (Corps) Nation Wide Permits (NWP) into waters of the U.S. that occur within tribal lands where tribes do not have treatment in a similar manner as a state and lands with exclusive federal jurisdiction in California, Nevada, Arizona, and Navajo Allottee land in the corresponding Sacramento, San Francisco, Los Angeles and Albuquerque Corps Districts: NWP 3, 4, 5, 6, 7, 13, 14, 15, 16, 17, 18, 19, 20, 22, 23, 25, 27, 30, 31, 32, 33, 34, 36, 37, 38, 41, 45, 46, 49, 53, 54, and 59. The Corps is not requesting certification for the following NWPs: 1, 2, 8, 9, 10, 11, 24, 28, and 35.

Section 401(a)(1) of the CWA requires applicants for Federal permits and licenses that may result in discharges into waters of the United States, to obtain certification that any such discharges will comply with applicable provisions of the CWA including Sections 301, 302, 303, 306 and 307. Where no state agency or tribe has authority to give such certification, the U.S. Environmental Protection Agency Region 9 (EPA) is the certifying authority. In this case, the EPA is making the certification decision for potential discharges that may result from the projects authorized under the proposed CWA Section 404 NWPs listed above.<sup>1</sup>

#### **Project Description**

On September 15, 2020, the Corps published in the Federal Register its proposal to reissue the NWPs.<sup>2</sup>

On January 13, 2021, the Corps published in the Federal Register its final rule reissuing 12 NWPs and issuing 4 new NWPs, as well as the NWP general conditions and definitions. The Corps is now proposing to re-issue 40 existing NWPs and one new NWP and associated general conditions and definitions, with some modifications. The Corps states that it is “proposing these modifications to simplify and clarify the NWPs, reduce burdens on the regulated public, and continue to comply with the statutory requirement that these NWPs authorize only activities with no more than minimal individual and cumulative adverse environmental effects”: 85 FR 57298. For the 41 proposed NWPs that have not been issued, the Corps has extended the reasonable period of time within which CWA Section 401 certifying authorities must act and has provided the opportunity for those CWA Section 401 certifying authorities to revise or reconsider their

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<sup>1</sup> This water quality certification does not apply to activities proceeding in the territories of the 25 tribes in Region 9 that have been approved as Section 401 certifying authorities – the Navajo Nation, Paiute-Shoshone of the Bishop Community, Big Pine Paiute-Shoshone Tribe, Twenty-Nine Palms Band of Mission Indians, Hoopa Valley Tribe, Hopi Tribe, Pyramid Lake Paiute Tribe, Dry Creek Rancheria of Pomo Indians, Pala Band of Mission Indians, Cortina Band of Wintun Indians, Walker River Paiute Tribe, Yerington Paiute, Duck Valley, Confederated Tribes of the Goshute Reservation, Gila River Indian Community, San Carlos Apache, Morongo Band of Mission Indians, Big Pine Paiute Tribe of Owen Valley, Rincon Band of Luiseno Indians, Cabazon, Quartz Valley, Karuk, White Mountain Apache Tribe, Table Mountain Rancheria, Resighini Rancheria, La Posta Band of Diegueno Mission Indians. In limited circumstances some lands within tribal boundaries fall outside a tribe's Section 401 certifying authority and are subject to this certification.

<sup>2</sup> See 85 FR 57298.

prior CWA Section 401 WQC decisions. For more details:

<https://www.usace.army.mil/Missions/Civil-Works/Regulatory-Program-and-Permits/Nationwide-Permits/>

## **General Information**

The general information provided in this section does not constitute a certification condition or conditions.

The project proponents for potential activities authorized under the NWP are responsible for obtaining all other permits, licenses, and certifications that may be required by federal, state, or tribal authorities.

Project proponents for potential projects authorized under the NWP should retain this certification in their files with the applicable NWP as documentation of EPA CWA Section 401 WQC for the above-referenced proposed final NWP. This CWA Section 401 WQC is specifically associated with the NWP described above and expires when those NWP expire.

Copies of this certification shall be kept on the job site and readily available for reference.

The project proponent for potential activities authorized under the NWP are encouraged to contact EPA during the project planning phase if they have any questions about relevant best management practices (e.g., bioengineering techniques, biodegradable erosion control measures, revegetation using native plant species, suitable fill materials, and disposal of debris/construction materials preventing runoff) and resources that can assist with compliance. Planning and construction practices, such as the use of native vegetation and bioengineering techniques, can be used to minimize adverse impacts to plants and animals and improve water quality.

As required by Condition 1, project proponents shall provide notice to EPA at least 30 days prior to commencing construction to provide EPA with the opportunity to inspect the activity for the purposes of determining whether any discharge from the proposed project will violate this water quality certification. Where the Corps requires a PCN for the applicable NWP, the project proponent should also provide the PCN to Region 9. If additional information is required per the conditions of this certification, that information shall be submitted with the PCN notification to the EPA. Concurrent with notification to the EPA, project proponents shall notify the appropriate Tribal Environmental or Governmental Office. Within 30 days of complete submittal, EPA will review the proposed project to determine compliance with this 401 certification.

Project proponents shall also notify EPA and the appropriate Tribal Environmental Office if spills or unauthorized discharges occurring during the project.

Pursuant with CWA Section 308(a), EPA representatives are authorized to inspect the authorized activity and any mitigation areas to determine compliance with the 401 certification and conditions.

To submit a project for review, or if you have questions regarding this certification, please contact EPA at: [R9cwa401@epa.gov](mailto:R9cwa401@epa.gov)

## **Granted with Conditions (121.7(d)(2)):**

On behalf of 123 federally recognized tribes within the purview of EPA Region 9, CWA Section 401 certification for the following proposed NWP is granted with conditions. EPA has determined that any discharge authorized under the following proposed NWP will comply with water quality requirements, as defined at 40 C.F.R. 121.1(n), subject to the following conditions pursuant to Section 401(d).

NWPs: 3, 5, 6, 7, 13, 14, 18, 19, 20, 23, 25, 27, 31, 32, 33, 36, 37, 38, 41, 45, 46, 59

EPA has determined that any discharge authorized under the following NWP will comply with water quality requirements as defined in 40 CFR 121.1(m) subject to the following conditions pursuant to CWA Section 401(d).

### **General EPA Conditions for Certification 2021 NWPs**

#### **Condition 1 – Notification to EPA**

Project proponents shall provide notice to EPA Region 9 prior to commencing construction to provide EPA with the opportunity to inspect the activity for the purposes of determining whether any discharge from the proposed project will violate this water quality certification. Where the Corps requires a PCN for the applicable NWP, the project proponent shall also provide the PCN to Region 9. Concurrent with notification to the EPA, project proponents shall notify the appropriate Tribal Environmental or Governmental Office.

***Why the condition is necessary to assure that any discharge authorized under the general license or permit will comply with water quality requirements:*** This condition is necessary to provide EPA Region 9 with notice and information to allow for an efficient and effective pre-operation inspection to determine if the certified discharge will violate the certification. If the project scope changes during the Corps review prior to initiation of the activity, it is also critical for EPA Region 9 to be provided any changes in the project design, scope, amount, and location of discharges to inform the pre-operation inspection opportunity as provided by 40 CFR 121.11(a).

***Citation(s) that authorizes this condition: 40 CFR 121.11(a)***

#### **Condition 2 – Projects or Activities Discharging to Impaired Waters**

Projects or activities are not authorized under the NWPs if the project will involve point source discharge into an active channel of a water of the U.S. identified as a section 303(d) or TMDL listed impaired waterbody and the discharge may result in further exceedance of a specific parameter (e.g., total suspended solids, dissolved oxygen, temperature) for which the waterbody is listed. The current lists of 303(d) and TMDL listed waterbodies are available on EPA Region 9's web site at: <https://www.epa.gov/tmdl/impaired-waters-and-tmdls-pacific-southwest-region-9>.

***Why the condition is necessary to assure that any discharge authorized under the general license or permit will comply with water quality requirements:*** A 303(d) listed waterbody is



impaired due to the cumulative effects of discharges of pollutants. The NWP's do not provide necessary activity specific information to determine compliance with specific water quality requirements, such as limits on total suspended solids, temperature, dissolved oxygen, nutrients, or pH for which a specific waterbody could be listed as impaired. Site specific analysis is required to determine whether water quality requirements are met in the active channel of a water of the U.S. identified as a section 303(d) or TMDL listed impaired waterbody.

***Citation(s) that authorizes this condition: CWA section 303(d)***

### **Condition 3 – Dewatering**

For all dewatering activities that propose structures or fill in waters of the U.S. that require authorization from the Corps, projects or activities are authorized under the NWP's if the site is naturally dewatered (e.g., seasonally dry), or if an artificial dewatering plan is developed and implemented to ensure that erosion and unauthorized discharges do not occur prior to site restoration. The dewatering plan shall be submitted to EPA Region 9 in conjunction with the notification in Condition 1, prior to site disturbance.

The Dewatering Plan shall, at a minimum, include the following:

- Methods for dewatering;
- Equipment that would be used to conduct the dewatering;
- Length of time the area is to be dewatered;
- Area (acres) and length (linear feet) in waters of the U.S. of the structure and/or fill used for the dewatering;
- Method for removal of the temporary structures and/or fill;
- Method for pre-disturbance measurement and restoration, following construction, of the preconstruction contours and site conditions of the waters of the U.S. affected by the structure or fill;
- Frequency and methods for monitoring and maintenance of dewatering measures to ensure unauthorized discharges do not occur before the site restoration is complete; all dewatering measures should be assessed within 24 hours after a rain event and any damaged measures shall be repaired or modified as required to protect water quality; and
- Reporting and adaptive management processes if any of the dewatering methods cause erosion or if unauthorized discharges occur before the site restoration is complete.
- EPA Region 9 requires reporting of unauthorized discharges or water quality violations within 24 hours.

***Why the condition is necessary to assure that any discharge authorized under the general license or permit will comply with water quality requirements:*** General conditions included in the NWP's do not address dewatering activities. Dewatering activities can often be a point source

for pollutants entering waters of the United States. This condition is necessary to ensure that the authorized activity does not result in more than minimal degradation to water quality and the aquatic environment because the project proponent will complete pre-planning, monitoring, maintenance, reporting and adaptive management to achieve site restoration.

***Citation(s) that authorizes this condition: 40 CFR § 230.10(d); 40 CFR § 230.24; 40 CFR § 230.70; 40 CFR § 230.71; 40 CFR § 230.74***

#### **Condition 4 – Site Management and Construction Practices**

Except as specified in the permit application, the project proponent shall not allow debris, silt, sand, cement, concrete, oil or petroleum, organic material, or other construction related materials or wastes to enter or be stored within 100 feet of where it may enter waters of the U.S. The project proponent shall develop and implement a plan to prevent pollutants from entering jurisdictional wetlands and waterways. The plan shall be submitted to EPA Region 9 in conjunction with the notification in Condition 1, prior to site disturbance. The plan shall include, at a minimum, the following measures:

- Silt fences, straw wattles, and other standard erosion control techniques<sup>3</sup> shall be employed to protect waters of the U.S. from sedimentation and other pollutants.
- Water used in dust suppression shall not contain contaminants that could violate surface water or aquifer standards.
- Project activities (e.g., work during rain events, heavy equipment in flowing water, etc.) that may result in channel and bank erosion within waters of the United States during or after construction are not authorized under this certification. Precipitation forecasts shall be considered when planning construction activities. The project proponent shall monitor the 72- hour forecast from the National Weather Service at <http://www.nws.noaa.gov>. When there is a forecast of more than 80% chance of rain, or at the onset of unanticipated precipitation, the project proponent shall remove all equipment from waters of the United States and implement erosion and sediment control measures (e.g., jute, straw, coconut fiber erosion control fabric, coir logs, straw), and cease all project activities within the waters. Erosion control measures shall be inspected within 24 hours after each rain event and repaired or modified as required to protect water quality.
- All equipment shall be cleaned prior to arriving on the project site. All equipment shall be inspected daily and prior to entering any streams or wetlands, for oil, gas, diesel, anti-freeze, hydraulic fluid, and other petroleum leaks. All equipment detected with leaks shall be repaired promptly or moved offsite within 24 hours.

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<sup>3</sup> Many state and local agencies have developed erosion control manual and guidelines that provide detailed information on standard techniques and practices. Examples include the Los Angeles Construction Site Best Management Practices (BMPs) Manual: <http://dpw.lacounty.gov/cons/specs/bmpmanual.pdf> and the City of Sacramento's Administrative and Technical Procedures Manual for Grading and Erosion and Sediment Control: <http://www.cityofsacramento.org/-/media/Corporate/Files/DOU/Specs-Drawings/Sediment-control-manual.pdf?la=en>

- All contaminated areas shall be cleaned immediately, and contaminated soil removed from the site or contained in enclosed containers. Containers shall be located no closer than 100 feet to a jurisdictional wetland or waterbody. If it is not possible to site a storage area at least 100 feet away, the project proponent shall explain the reasons for the storage location and the additional measures that will be implemented to protect waters in their plan.
- Containment booms and/or absorbent material shall be available onsite. In the case of spills, containment booms and/or absorbent materials shall be employed immediately to prevent discharges from reaching waters of the U.S. Project proponents shall notify the appropriate Tribal government and EPA Region 9 within 24 hours if spills or unauthorized discharges occur during the project. As part of the notice, the project proponent shall provide plans for remedying the spill or unauthorized discharge.

***Why the condition is necessary to assure that any discharge authorized under the general license or permit will comply with water quality requirements:*** Protection of water quality includes implementation of suitable measures to control site runoff, spillage, waste disposal, and drainage from construction activities and raw material storage as such sources may contribute significant amounts of pollutants into waters of the United States. Timing the discharge of material, for instance by limiting fill during rain events, minimizes impacts to water quality. Measures minimize adverse effects to plant and animal populations by maintaining habitat for these species. The use of measures as required under this condition will ensure that the authorized activity does not result in more than minimal degradation to water quality. The condition is necessary to prevent the unauthorized release of pollutants into waters of the United States. This condition is necessary to ensure water quality is not degraded by oil, grease, gasoline, or other types of fluids used to operate and maintain equipment used to complete the project. The condition minimizes equipment contact with water (and potential for oil, gas, invasive species, etc. contamination) and allows for clean-up of potential spills before entering waters. This condition also helps protect the water quality and native biology of the impacted waters by preventing the spread of invasive or nuisance species. This condition is necessary to ensure minimization of adverse effects on populations of plants and animals and to preserve the water quality and flood protection benefits provided by vegetation in riparian areas adjacent wetlands and waterbodies. Inspection times are required to ensure that pollution and erosion controls remain effective or are repaired promptly.

***Citation(s) that authorizes this condition: 40 CFR § 230.10(d); 40 CFR § 230.70; 40 CFR § 230.72; 40 CFR § 230.74; 40 CFR § 230.75***

### **Condition 5 – Discharges in Aquatic Resources of Special Concern**

Activities resulting in a point source discharge in the following types of jurisdictional aquatic resources of special concern shall request a project-specific CWA Section 401 WQC: bogs, fens, and other peatlands; natural springs; vernal pools; alkali wetlands; riffle-pool complexes of streams; marine or estuarine mudflats; salt marshes; marine waters with native eelgrass or kelp beds; or marine nearshore forage fish habitat. These resources may be identified using USGS

topographic maps, the U.S. Fish and Wildlife Service National Wetland Inventory, or other aquatic resource identification documentation.

***Why the condition is necessary to assure that any discharge authorized under the general license or permit will comply with water quality requirements:*** Aquatic resources of special concern include special aquatic sites<sup>4</sup> and other aquatic resources that are specific waters of the U.S. that are difficult to replace, are unique, and/or have high ecological function. General permits, including NWP, are only allowed for those discharges and associated activities that will cause no more than minimal adverse impacts to the aquatic environment. However, point source discharges to the types of aquatic resources of special concern listed above could have more than minimal adverse impacts on an individual or cumulative basis, because the discharge of dredged or fill material would impair and degrade the chemical, physical and biological conditions of these systems. As noted in 40 C.F.R. § 230.1(d), “[f]rom a national perspective, the degradation or destruction of special aquatic sites, such as filling operations in wetlands, is considered to be among the most severe environmental impacts covered by these Guidelines. The guiding principle should be that degradation or destruction of special sites may represent an irreversible loss of valuable aquatic resources.” Discharge of dredged or fill material into these systems can alter water circulation patterns and hydroperiods, which in turn can release nutrients causing shifts in native to non-native species composition; release chemicals that adversely impact biota (plants and animals), increase turbidity levels, reduce light penetration and photosynthesis, and ultimately change the capacity of these systems to support aquatic life uses and other beneficial uses of these special aquatic sites, including impairing their diverse and unique communities of aquatic organisms, including fish, wildlife and the habitats upon which they depend. Thus, this condition is established to ensure a case-by-case review of any actions or activities proposed in these specific aquatic resource site types which are inherently difficult to replace, have high ecological functions and values, and for which degradation cannot be determined to meet water quality requirements on a general permit basis.

***Citation(s) that authorizes this condition: 40 C.F.R. § 230.1(d); 40 C.F.R. § 230.10(c); 40 C.F.R. § 230.21; 40 C.F.R. § 230.23; 40 C.F.R. § 230.32; 40 C.F.R. Part 230, Subpart E.***

#### **Condition 6 – Disturbance to Streambank Vegetation**

Disturbance to jurisdictional streambank vegetation shall be limited to no more than 0.5 acre of vegetation removal. Areas of vegetation removal shall be identified on construction plans and submitted to EPA as part of the notification. Areas of streambank vegetation adjacent to the planned disturbance area shall be clearly marked with signs, high visibility flagging, orange fencing, or some other method that clearly indicates the limits of the disturbance area to prevent encroachment into adjacent habitat. Revegetation of disturbed areas shall be based on pre-disturbance or reference site conditions, including percent cover and native species diversity. Therefore, the project proponent shall photo-document the site prior to, during and post-construction, and post-restoration. Revegetated areas shall use local or regionally sourced native seed and other plant materials. Non-native and invasive species shall not be used for restoration

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<sup>4</sup> See 40 C.F.R. Part 230 Subpart E.

activities. Stockpile weed-free topsoil shall replace disturbed soil areas. Revegetation measures may include topsoil replacement, planting, seeding, fertilization, liming, and weed-free mulching. Projects that will remove more than 0.5 acre of vegetation shall request a project-specific 401 certification.

***Why the condition is necessary to assure that any discharge authorized under the general license or permit will comply with water quality requirements:*** Streambank vegetation is important in stabilizing soils, reducing run-off, providing for shaded aquatic areas, and providing cover and habitat for aquatic wildlife. Invasive species are detrimental to functioning aquatic ecosystems. Revegetation planting with native plant species is necessary to ensure ecosystem functions and services. This condition is necessary to ensure minimization of adverse effects on water quality as well as populations of plants and animals that derive benefits provided by vegetation in riparian areas adjacent wetlands and waterbodies. This condition size limit is necessary to require project-specific CWA Section 401 WQC review so EPA Region 9 can ensure that projects will be conditioned to avoid and minimize adverse impacts to comply with water quality requirements.

***Citation(s) that authorizes this condition:*** 40 CFR § 230.10(d); 40 CFR § 230.70; 40 CFR § 230.72; 40 CFR § 230.74; 40 CFR § 230.75

### **NWP Permit Specific Conditions**

#### **NWP-03 Maintenance**

NWP-03 is conditionally certified subject to the General Conditions above, and the following specific condition.

Replacement of "Currently serviceable structures" under this permit shall be appropriately sized culverts or structures<sup>5</sup> for the drainage area and/or anticipated peak flow so that structures do not cause or exacerbate channel incision, bank destabilization, and/or prevent fish and wildlife passage due to inadequate design or construction standards. Replacement of existing riprap is allowed but the placement of additional non-vegetated riprap beyond the original footprint is not authorized and requires an individual project-specific certification. If a PCN is required for the NWP, the project proponent shall submit design documentation used to determine the appropriate sizing of culverts and/or structures to EPA Region 9, the correlating Tribal government, and the authorizing Corps District.

***Why the condition is necessary to assure that any discharge authorized under the general license or permit will comply with water quality requirements:*** Improperly sized or undersized culverts constrict the channel, create flow hydraulics and channel conditions that are markedly dissimilar from those in the natural channel, and impede the movement fish and other aquatic organisms along the stream corridor. Areas covered by riprap limit the biological, chemical, and

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<sup>5</sup> For site where no hydrologic data is available methods such as Talbotts formula for culvert sizing: [http://www.sd-w.com/civil/talbots\\_formula.html](http://www.sd-w.com/civil/talbots_formula.html). Other established methods such as those described in the Handbook For Forest, Ranch And Rural Roads ([http://www.pacificwatershed.com/sites/default/files/12\\_-\\_appendix\\_a\\_-\\_culvert\\_sizing\\_procedures.pdf](http://www.pacificwatershed.com/sites/default/files/12_-_appendix_a_-_culvert_sizing_procedures.pdf)) may also be used.

physical processes that can occur in those aquatic resources. The lack of vegetation results in lower quality habitat and less carbon cycling and other ecosystem functions in aquatic and riparian areas. This condition is necessary to ensure the properly sized and designed replacement structures are used to protect aquatic habitat and to ensure that the authorize activities would result in more than a minimal degradation of water quality. Projects that require a PCN for NWP meet a size, location or resource threshold that requires design review to ensure that there are no more than minimal impacts to aquatic resources.

***Citation(s) that authorizes this condition: 40 CFR § 230.10(d); 40 CFR § 230.71; 40 CFR § 230.72***

### **NWP-07 Outfall Structures and Associated Intake Structures**

NWP-07 is conditionally certified subject to the General Conditions above, and the following specific condition.

Outfall structures shall be appropriately sized and designed to prevent high pressure discharge of stormwater that may result in localized scouring and erosion<sup>6</sup>. The project proponent shall submit project plans to EPA Region 9, the correlating Tribal government, and the authorizing Corps District. The project plans shall describe the design documentation used to determine the appropriate sizing of outfall structures in the final project design.

***Why the condition is necessary to assure that any discharge authorized under the general license or permit will comply with water quality requirements:*** Storm drain and outfall systems are dependent on topography, hydrology, surface hydraulics, outfall location and constraints for design layout. Outfall materials have a design maximum velocity to ensure that structures and surrounding areas do not have detrimental erosion. This condition is necessary to ensure outfall structures are designed and constructed in a manner that will prevent localized erosion at the point of discharge and will minimize impacts to downstream water quality.

***Citation(s) that authorizes this condition: 40 CFR § 230.10(d), 40 CFR § 230.70; 40 CFR § 230.73***

### **NWP-13 Bank Stabilization**

NWP-13 is conditionally certified subject to the General Conditions above, and the following specific condition.

For any activities that include bank stabilization, the project proponent shall use bioengineering techniques for bank stabilization activities instead of or in combination with hard armoring; this may be either the sole use of native vegetation or other bioengineered design techniques (e.g.,

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<sup>6</sup> Outfall design information for common types, like stormwater, may be found through state Departments of Transportation (e.g. Caltrans <https://dot.ca.gov/programs/design/hydraulics-stormwater>) and state water quality regulatory agencies (e.g. [https://www.waterboards.ca.gov/rwqcb2/water\\_issues/programs/stormwater/muni/nrdc/chapter%2013%20design%20examples%20part%202.pdf](https://www.waterboards.ca.gov/rwqcb2/water_issues/programs/stormwater/muni/nrdc/chapter%2013%20design%20examples%20part%202.pdf)). Local, county, state, and tribal resources may also be used to determine outfall design criteria and/or the maximum design velocity for stormwater and similar outfalls.

willow plantings, root wads, large woody debris, etc.), or a combination of hard-armoring (e.g., rock) and native vegetation or bioengineered design techniques. If it is not possible to solely rely on bioengineering techniques, the project proponent shall submit project plans to EPA Region 9, the correlating Tribal government, and the authorizing Corps District. Projects consisting entirely of riprap or similar rock techniques are limited to 300 linear feet under this conditional certification; project proponents with riprap or similar rock activities over 300 linear feet shall request a project-specific water quality verification. For both partially bioengineered projects, and those composed of riprap, the project plans shall describe the design techniques and stabilization methods assessed to determine the final project design. The use of soil cement, concrete, and grouted rip-rap hard armoring methods are not authorized under this certification and project proponents shall submit a request for a project-specific water quality certification.

***Why the condition is necessary to assure that any discharge authorized under the general license or permit will comply with water quality requirements:*** The use of native vegetation and bioengineering is necessary to ensure the activity incorporates appropriate measures to that will minimize potential adverse impacts of the discharge on water quality and the aquatic ecosystem. Planning and construction practices can be used to minimize adverse impacts to plants and animals and can compensate for destroyed habitat. This condition is necessary to provide the project proponent with clarity on how to meet appropriate soil erosion and sediment controls, as required by NWP's General Condition 12. These appropriate and practicable alternatives often include more ecologically beneficial soft or bioengineering techniques. In conjunction with other bank stabilization practices, this condition will ensure water quality impacts from potential discharges of dredged or fill material are minimized. As a result, this condition is necessary to require project-specific CWA Section 401 WQC review so EPA Region 9 can ensure that projects will be conditioned to avoid and minimize adverse impacts to comply with water quality requirements. Native vegetation and natural materials and structures, such as biodegradable erosion control blankets, staking and live cutting, biologs, coir fiber rolls, brush mattresses, etc. can be effective erosion control measures are when installed properly under the right conditions. Projects without bioengineering are limited to 300 linear feet due to the negative impacts of hard armoring on aquatic habitat functions and water quality. 300 linear feet is the previous restriction in the NWP's without waiver by the District Engineer and is supported by years of data on minimal adverse impacts to the aquatic environment.

***Citation(s) that authorizes this condition: 40 CFR § 230.10(d); 40 CFR § 230.71; 40 CFR § 230.72; 40 CFR § 230.75***

#### **NWP-14 Linear Transportation Projects**

NWP-14 is conditionally certified subject to the General Conditions above, and the following specific condition.

For replacement crossings that would result in a reduction in the pre-construction ordinary high water mark channel width and depth of open waters of the U.S. at the crossing, as compared to the upstream and downstream open waters the project proponent shall submit design plans and

documentation to EPA Region 9, the correlating Tribal government, and the authorizing Corps District. The documentation shall include:

- Information on why it is not practicable to approximate the pre-construction ordinary high water mark channel width and depth of the upstream and downstream open waters, and
- Documentation demonstrating that the reduction in the pre-construction bankfull width and the channel depth would not result in adverse effects to water quality and aquatic resource functions and services. Adverse effects may include, but are not limited to erosion, degradation, and increased water velocity. Functions and services to be considered include but are not limited to short- or long-term surface water storage, subsurface water storage, moderation of groundwater flow or discharge, dissipation of energy, cycling of nutrients, removal of elements and compounds, retention of particulates, export of organic carbon, and maintenance of plant and animal communities.

Projects that may result in an adverse effect because of reduction in channel width, depth, or open water shall request a project-specific 401 certification.

***Why the condition is necessary to assure that any discharge authorized under the general license or permit will comply with water quality requirements:*** This condition is necessary to ensure the authorized activity will result in only minimal impacts to water quality and the aquatic ecosystem through obstruction of flow or other reductions in physical characteristics related to water circulation. This condition is necessary to require project-specific CWA Section 401 WQC review so EPA Region 9 can ensure that projects will be conditioned to avoid and minimize adverse impacts to comply with water quality requirements.

***Citation(s) that authorizes this condition: 40 CFR § 230.10 and 40 CFR § 230.72***

## **NWP-27 Aquatic Habitat Restoration, Establishment, and Enhancement Activities**

NWP-27 is conditionally certified subject to the General Conditions above, and the following specific conditions.

Condition (a): To document that the project results in a net increase in aquatic functions and services, the project proponent shall submit a project monitoring and adaptive management plan to EPA Region 9, the correlating Tribal government, and the authorizing Corps District. The plan shall include:

- Goals and objectives of the project;
- Specific performance metrics that will be used to evaluate the success of meeting those goals and objectives;
- Monitoring methods or techniques (including timing and duration) used to evaluate the progress towards achieving the desired increase in aquatic functions and services; and



- Adaptive management techniques and reporting processes to be implemented if the project is not meeting net increase performance metrics.

Functions and services to be considered in the justification include, but are not limited to, short- or long-term surface water storage, subsurface water storage, moderation of groundwater flow or discharge, dissipation of energy, cycling of nutrients, removal of elements and compounds, retention of particulates, export of organic carbon, and maintenance of plant and animal communities.

***Why the condition is necessary to assure that any discharge authorized under the general license or permit will comply with water quality requirements:*** Minimization of adverse effects on populations of plants and animals can be achieved by using planning and construction practices to institute habitat development and restoration to produce a new or modified environmental state of higher ecological value by displacement of some or all the existing environmental characteristics. Habitat development and restoration techniques can be used to minimize adverse impacts and to compensate for destroyed habitat. The project proponent will complete pre-planning, monitoring, maintenance, reporting and adaptive management to achieve site restoration and enhancement.

***Citation(s) that authorizes this condition: 40 CFR § 230.10(d); 40 CFR § 230.72; 40 CFR § 230.75***

Condition (b): For removal of small water control structures authorized under NWP 27, to ensure that effective implementation measures are employed for the prevention of uncontrolled discharges and water quality violations, the project proponent shall conduct pre-disturbance site assessment and submit project plans to EPA Region 9, the correlating Tribal government, and the authorizing Corps District. The project plans shall include:

- Methods to remove and dispose of any accumulated sediments stored behind the structure;
- Methods to ensure that the channel bed and banks are stabilized to prevent head-cutting and failure after the structure is removed;
- Stabilization methods that will be implemented to minimize secondary impacts to waters resulting from the removal of the structure; and
- Adaptive management and reporting processes if an unauthorized discharge or water quality violation were to occur

***Why the condition is necessary to assure that any discharge authorized under the general license or permit will comply with water quality requirements:***

This condition is necessary to ensure that physical habitat and hydrologic characteristics of waters are not degraded. Uncontrolled release of sediment could contribute to degradation of water quality, aquatic dependent plants and animals, and loss of capacity of the waterbody to assimilate nutrients and purify water. The project proponent will complete pre-planning,

monitoring, maintenance, reporting and adaptive management to ensure that removal of small water control structures complies with water quality requirements.

***Citation(s) that authorizes this condition: 40 CFR § 230.10(d); 40 CFR § 230.71; 40 CFR § 230.72; 40 CFR § 230.75***

### **NWP-31 Maintenance of Existing Flood Control Facilities**

NWP-31 is conditionally certified subject to the General Conditions above, and the following specific condition.

If flood control facilities have levees that support existing jurisdictional non-invasive riparian vegetation, the project proponent shall submit project plans including baseline measurement of the existing vegetative cover, and measures to avoid and minimize impacts to jurisdictional non-invasive riparian vegetation growing on levees to EPA Region 9, the correlating Tribal government, and the authorizing Corps District. Limited removal of riparian vegetation required to access an individual maintenance work area is permitted under this certification, but the removal of jurisdictional non-invasive riparian vegetation from levees as a specific and intended maintenance activity is not authorized and requires a project-specific 401 certification. For authorized project activities that remove jurisdictional non-invasive riparian vegetation for access to work areas, the project proponent shall submit a revegetation plan developed using the native vegetative cover baseline, or other appropriate vegetative cover (per Natural Resources Conservation Service, CA Department of Fish and Wildlife, etc. guidelines), to EPA Region 9, the correlating Tribal government, and the authorizing Corps District.

***Why the condition is necessary to assure that any discharge authorized under the general license or permit will comply with water quality requirements:*** Riparian vegetation can provide many benefits for water quality such as bank stabilization and ground cover protecting slopes from rain-induced surface erosion. In cases where levees are composed of largely uncohesive materials, root-reinforcement provides significant support to the soil matrix, whilst additionally reducing shear stresses acting on the soil from flowing water and protecting the levee from rainfall impact and runoff. Riparian vegetation also provides for other beneficial uses including aesthetics, habitat and protection for fish and wildlife species and overall improved complexity to the river system. This condition is necessary to ensure activities authorized under this permit will not result in more than minimal impacts to water quality and beneficial uses.

***Citation(s) that authorizes this condition: 40 CFR § 230.10; 40 CFR § 230.72, 40 CFR § 230.75***

### **NWP-33 Temporary Construction, Access, and Dewatering**

NWP-33 is conditionally certified subject to the General Conditions above, and the following specific condition.

New temporary access roads shall be no more than 20 feet wide and shall be designed to minimize changes to the hydraulic flow characteristics of the stream and degradation of water quality.

Temporary access roads are those that are in place for no more than one growing season.

The following site management and construction practices shall be followed to ensure that flow and circulation patterns of waters are not impaired and adverse effects on the aquatic environment are minimized:

- The temporary road or access shall be stabilized, monitored, and maintained during and following construction to prevent erosion. Stabilization materials that are damaged shall be repaired or modified within 24 hours of damage to protect water quality.
- Mats shall be used in temporary access and construction occurring in wetlands and ephemeral streams. Mat should be in good condition and installed with minimal dragging to reduce soil disturbance.
- The boundaries of temporary access within waters and wetlands shall be clearly marked by flagging, orange construction fencing, or other visible marking method to minimize the impacts by heavy equipment.

***Why the condition is necessary to assure that any discharge authorized under the general license or permit will comply with water quality requirements:*** This measure is included to ensure that temporary access roads and dewatering activities minimize potential adverse impacts of the discharge on water quality and the aquatic ecosystem. Heavy equipment can compress wetland soils and result in decreased wetland function. Mats spread out the weight of heavy equipment so the soil is not compressed and can prevent ruts and other destructive impacts. In stream crossings, mats are used to reduce soil disturbance and prevent excessive rutting. Visible marking of the wetlands and water boundaries minimizes impacts that can result in ruts, erosion, and other negative impacts to water quality. Fill impacts that last longer than one growing season can have permanent reductions on ecosystem function and permanent loss of habitat to aquatic plants and animals.

***Citation(s) that authorizes this condition:*** 40 CFR § 230.10; 40 CFR § 230.72; 40 CFR § 230.75

### **NWP-37 Emergency Watershed Protecting and Rehabilitation**

NWP-37 is conditionally certified subject to the General Conditions above, and the following specific conditions.

Condition (a): Construction activities shall not result in the permanent channelization of streams or sloughs. Channelization is defined, for this purpose, as the placement of excess material in a manner that modifies the bank alignment, and subsequently the channel alignment, from its pre-emergency condition. Permanent for the purposes of this conditional certification are impacts to waters lasting more than one growing season.

***Why the condition is necessary to assure that any discharge authorized under the general license or permit will comply with water quality requirements:*** The discharge of dredged or fill material which alters the contours of a waterbody and/or its riparian zone can lead to increased erosion and sediment loads to the waterbody and the loss or change of habitat and preferred food sources for wildlife species associated with the aquatic ecosystem.

***Citation(s) that authorizes this condition: 40 CFR § 230.10(d); 40 CFR § 230.73; 40 CFR § 230.75; 40 CFR § 230.76***

Condition (b): Construction of temporary structures or drains for the purpose of reducing or preventing flood damage shall be removed within 60 days following the completion of the permitted action.

***Why the condition is necessary to assure that any discharge authorized under the general license or permit will comply with water quality requirements:*** This measure is included to ensure that temporary activities minimize potential adverse impacts of the discharge on water quality and the aquatic ecosystem. Dredge and fill impacts in response to emergency that are in place after the permitted action are complete can have permanent reductions on ecosystem function and permanent loss of habitat to aquatic plants and animals.

***Citation(s) that authorizes this condition: 40 CFR § 230.10; 40 CFR § 230.73; 40 CFR § 230.75***

#### **NWP-41 Reshaping Existing Drainage Ditches**

NWP-41 is conditionally certified subject to the General Conditions above, and the following specific conditions.

Condition (a): To document that the modification of existing drainage and irrigation ditches results in improvement to water quality, the project proponent shall submit project plans and documentation to EPA Region 9, the correlating Tribal government, and the authorizing Corps District. The documentation shall include:

- Water quality improvements that are expected from implementation of the project. These may include, but are not limited to, improvement in water characteristics such as pH, dissolved oxygen, or temperature, and/or a decrease in pollutants, algal blooms, etc.
- Construction and modification methods or techniques that are expected to result in water quality improvement
- Monitoring methods and/or techniques to evaluate progress in improving water quality

***Why the condition is necessary to assure that any discharge authorized under the general license or permit will comply with water quality requirements:*** This condition is necessary to ensure the authorized activity will improve water quality as required by the NWP. Water movements including current and water circulation are the physical [movements](#) of water that affect aquatic ecosystem. Reshaping of existing drainages ditches should result in improvement of environmental characteristics and values related to water flow circulation by removing obstructions or otherwise changing the dimensions of a water body.

***Citation(s) that authorizes this condition: 40 CFR § 230.23***

Condition (b): All side-cast materials from excavation shall be removed from unstable slopes and disposed of within non-jurisdictional areas. Sidecast material that is incorporated into authorized activities shall be placed to avoid erosion, slumping, or leaching of materials into the surrounding aquatic features. Depending on topographic and precipitation conditions, side-cast materials may need to be contained by silt fencing, or other containment control materials to prevent point source [pollution](#) into the adjacent drainage ditch.

***Why the condition is necessary to assure that any discharge authorized under the general license or permit will comply with water quality requirements:*** [Disposal sites](#) adjacent to aquatic features have the potential for erosion, slumping or leaching of [materials](#) into the surrounding aquatic ecosystem unless properly sited or controlled. Unstable slopes may slump and introduce material in ditches, which increases turbidity. Disposal of side-cast material from excavation of existing drainage ditches placed in jurisdictional wetlands constitutes a fill that can adversely affect water quality and the aquatic environment and is not authorized under this certification.

***Citation(s) that authorizes this condition:*** 40 CFR § 230.10; 40 CFR § 230.72

#### **NWP-45. Repair of Uplands Damaged by Discrete Events**

NWP-45 is conditionally certified subject to the General Conditions above, and the following specific condition.

For any activities that include bank stabilization to protect restored uplands, the project proponent shall use bioengineering techniques for bank stabilization activities instead of hard armoring; this may be either the sole use of native vegetation or other bioengineered design techniques (e.g., willow plantings, root wads, large woody debris, etc.) or a combination of hard armoring (e.g., rock) and native vegetation or bioengineered design techniques. If it is not possible to solely rely on bioengineering techniques, the project proponent shall submit project plans to EPA Region 9, the correlating Tribal government, and the correlating authorizing Corps District. Projects consisting entirely of riprap or similar rock techniques are limited to 300 linear feet under this conditional certification; project proponents with riprap or similar rock activities over 300 linear feet shall request a project-specific water quality verification. For both partially bioengineered projects, and those composed of riprap, the project plans shall describe the design techniques and stabilization methods assessed to determine the final project design. If the project proponent did not consider bioengineering techniques in the submitted project design, they shall request a project-specific water quality certification. The use of soil cement, concrete, and grouted rip-rap hard armoring methods are not authorized under this certification and project proponents shall submit a request for a project-specific water quality certification.

***Why the condition is necessary to assure that any discharge authorized under the general license or permit will comply with water quality requirements:*** The use of native vegetation and bioengineering is necessary to ensure the activity incorporates appropriate measures to that will minimize potential adverse impacts of the discharge on water quality and the aquatic ecosystem. Planning and construction practices can be used to minimize adverse impacts to plants and animals and can compensate for destroyed habitat. This condition is necessary to provide the

project proponent with clarity on how to meet appropriate soil erosion and sediment controls, as required by NWP's General Condition 12. These appropriate and practicable alternatives often include more ecologically beneficial soft or bioengineering techniques. In conjunction with other bank stabilization practices, this condition will ensure water quality impacts from potential discharges of dredged or fill material are minimized. As a result, this condition is necessary to require individual CWA Section 401 WQC review so EPA Region 9 can ensure that projects will be conditioned to avoid and minimize adverse impacts to comply with water quality requirements. Native vegetation and natural materials and structures, such as biodegradable erosion control blankets, staking and live cutting, biologs, coir fiber rolls, brush mattresses, etc. can be effective erosion control measures are when installed properly under the right conditions. Projects without bioengineering are limited to 300 linear feet due to the negative impacts of hard armoring on aquatic habitat functions and water quality. 300 linear feet is the previous restriction in the NWP's without waiver by the District Engineer and is supported by years of data on minimal adverse impacts to the aquatic environment.

***Citation(s) that authorizes this condition: 40 CFR § 230.10(d); 40 CFR § 230.71; 40 CFR § 230.72; 40 CFR § 230.75***

#### **NWP-46 Discharges in Ditches**

NWP 46 is conditionally certified, subject to the general conditions listed above, except for the following projects, where an individual project-specific water quality certification is required, when impacts to non-tidal waters of the U.S., including intermittent and ephemeral streams are greater than 0.5 acre.

***Why the condition is necessary to assure that any discharge authorized under the general license or permit will comply with water quality requirements:***

Drainages, including ditches, in the Arid West are typically narrow. For example, typical roadway ditches designed by AZDOT are between 2-10" wide. Because of the narrow width typical of ditches in the Arid West, measurement by area can result in many linear feet of impact relative to other regions of the U.S. The 0.5 acre limit is necessary to regionalize the 401 certification for this condition due to the resource types and typical practices. This condition is necessary to ensure that physical habitat and hydrologic characteristics of waters are not degraded. Discharge of large amounts of fill material in intermittent and ephemeral streams could contribute to degradation of water quality, aquatic dependent plants and animals, and loss of capacity of the waterbody to assimilate nutrients, purify water, or reduce wave energy.

***Citation(s) that authorizes this condition: 40 CFR § 230.10; 40 CFR § 230.70***

#### **Waived (121.9(a)(1)):**

On behalf of 123 federally recognized tribes within the purview of EPA Region 9, EPA is expressly waiving its authority to act on the CWA Section 401 certification request for the following proposed NWP's:

NWP's: 4, 15, 16, 17, 22, 30, 34, 49, 53, 54

## **Summary Table**

<b>General Permit</b>	<b>2021 EPA 401 Certification</b>
1. Aids to Navigation	No cert. request
2. Structures in Artificial Canals	No cert. request
3. Maintenance	Certify with Conditions
4. Fish and Wildlife Harvesting, Enhancement, Attraction Devices and Activities	Waived
5. Scientific Measurement Devices	Certify with Conditions
6. Survey Activities	Certify with Conditions
7. Outfall Structures and Associated Intake Structures	Certify with Conditions
8. Oil and Gas Structures on the Outer Continental Shelf	No cert. request
9. Structures in Fleeting and Anchorage Areas	No cert. request
10. Mooring buoys	No cert. request
11. Temporary Recreation Structures	No cert. request
13. Bank Stabilization	Certify with Conditions
14. Linear Transportation Projects	Certify with Conditions
15. U.S. Coast Guard Approved Bridges	Waived
16. Return Water from Upland Contaminated Disposal Areas	Waived
17. Hydropower Projects	Waived
18. Minor Discharges	Certify with Conditions
19. Minor Dredging	Certify with Conditions
20. Response Operations for Oil or Hazardous Substances	Certify with Conditions
22. Removal of Vessels	Waived
23. Approved Categorical Exemptions	Certify with Conditions
24. Indian Tribe or State Administered Section 404 Program	No cert. request
25. Structural Discharges	Certify with Conditions
27. Aquatic Habitat Restoration, Enhancement and Establishment Activities	Certify with Conditions
28. Modifications of Existing Marinas	No cert. request
30. Moist Soil Management for Wildlife	Waived
31. Maintenance of Existing Flood Control Facilities	Certify with Conditions
32. Completed Enforcement Actions	Certify with Conditions
33. Temporary Construction, Access, and Dewatering	Certify with Conditions
34. Cranberry Production Activities	Waived
35. Maintenance Dredging of Existing Basins	No cert. request
36. Boat Ramps	Certify with Conditions
37. Emergency Watershed Protection and Rehabilitation	Certify with Conditions
38. Cleanup of Hazardous and Toxic Waste	Certify with Conditions
41. Reshaping Existing Drainage Ditches	Certify with Conditions
45. Repair of Uplands Damaged by Discrete Events	Certify with Conditions

General Permit	2021 EPA 401 Certification
46. Discharges in Ditches	Certify with Conditions
49. Coal Remining Activities	Waived
53. Removal of Low Head Dams	Waived
54. Living Shorelines	Waived
59. Water Reclamation and Reuse Facilities	Certify with Conditions





**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY**  
**REGION IX**  
**75 Hawthorne Street**  
**San Francisco, CA 94105-3901**

Brigadier General Paul E. Owen  
Division Engineer, South Pacific Division  
U.S. Army Corps of Engineers  
1455 Market Street  
San Francisco, CA 94103-1398

Subject: Programmatic Clean Water Act, Section 401 Certification of the Draft 2020 Nationwide Permits for Tribal Lands within the Region 9 coverage area of the U.S. Environmental Protection Agency

Dear General Owen,

The U.S. Environmental Protection Agency Region 9 (EPA) has responsibility under section 401 of the Clean Water Act (CWA) to evaluate and certify water quality protections for federal permits or licenses issued for work on tribal lands (40 CFR 121.13(a)). We have reviewed the U.S. Army Corps of Engineers (Corps) Federal Register notice dated September 15, 2020, announcing the proposed issuance of the Corps' CWA Section 404 Nationwide Permits (NWP). We have also reviewed the regional conditions proposed for each District within the South Pacific Division and hereby transmit our programmatic water quality certification of these general permits. The enclosed conditions of the NWPs become binding requirements of NWPs issued for work on tribal lands within EPA Region 9.<sup>1,2</sup> Please instruct your regulatory staff to provide this certification to anyone contacting the Corps with applicable projects.

Based on a thorough review of the materials provided by the Corps, EPA made a determination as to whether potential discharges authorized by the proposed NWPs will comply with applicable provisions of Sections 301, 302, 303, 306 and 307 of the CWA. In summary, of the 57 proposed active permits, EPA is conditionally certifying 19 NWPs, denying 12 NWPs, and waiving certification for 15 NWPs. The Corps is not requesting certification for 11 NWPs.<sup>3</sup> The 401 certification conditions are necessary to assure that potential discharges authorized by the NWPs will comply with applicable water quality requirements. A table summarizing the certification status for each NWP, is included in the attached certification. The attached programmatic 401 certification will remain in effect for the authorization

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<sup>1</sup> This water quality certification does not apply to activities proceeding in the territories of the 23 tribes in Region 9 that have been approved as Section 401 certifying authorities —the Navajo Nation, Hualapai Tribe, Paiute-Shoshone of the Bishop Community, Big Pine Paiute-Shoshone Tribe, Twenty-Nine Palms Band of Mission Indians, Hoopa Valley Tribe, Hopi Tribe, Pyramid Lake Paiute Tribe, Dry Creek Rancheria of Pomo Indians, Pala Band of Mission Indians, Cortina Band of Wintun Indians, Walker River Paiute Tribe, Yerington Paiute, Duck Valley, Confederated Tribes of the Goshute Reservation, Gila River Indian Community, San Carlos Apache, Morongo Band of Mission Indians, Big Pine Paiute Tribe of the Owen Valley, Rincon Band of Luiseno Indians, Cabazon, Quartz Valley, Karuk and White Mountain Apache Tribe. In limited circumstances some lands within tribal boundaries fall outside a tribe's Section 401 certifying authority and are subject to this certification.

<sup>2</sup> Consistent with the *EPA Policy on Consultation and Coordination with Indian Tribes*, EPA sent a letter dated September 29, 2020, offering to consult with tribes in Region 9 on this certification. EPA did not receive any formal requests for consultation or any written comments on the draft certification.

<sup>3</sup> The 11 NWPs are as follows: 1, 2, 8, 9, 10 11, 24, 28, 35, A, B.

period of the 2020 NWP's and will be re-evaluated when the NWP's are next proposed for reissuance and revisions in 2025.

If a project fails to meet the enclosed conditions, the applicant must contact EPA Region 9 for individual project certification. Please advise project proponents who seek authorization under the NWP's for individual project certification on tribal lands within EPA Region 9 to submit their questions, pre-filing meeting requests, and subsequent 401 certification requests when required to: R9-401-Certs@epa.gov.

Thank you for your ongoing partnership in implementing the regulatory programs of the CWA. Please contact me at (415) 972-3337 with any questions regarding this conditional certification, or have your staff contact Elizabeth Goldmann at (415) 972-3398 or goldmann.elizabeth@epa.gov.

Sincerely,

**TOMAS  
TORRES**

Digitally signed by  
TOMAS TORRES  
Date: 2020.12.11  
14:12:16 -08'00'

Tomás Torres  
Director  
Water Division

Enclosure:

U.S. Environmental Protection Agency Region 9's Programmatic Clean Water Act Section 401  
Certification of the 2020 Nationwide Permits for Projects on Applicable Tribal Lands in California,  
Nevada, Arizona and Navajo Allottee Lands

cc:

All federally recognized Indian Tribes within EPA Region 9  
James Mazza, Regulatory Branch Chief, San Francisco District  
Michael Jewel, Regulatory Branch Chief, Sacramento District  
David Castanon, Regulatory Branch Chief, Los Angeles District  
Kelly Allen, Regulatory Branch Chief, Albuquerque District  
Wade Eakle, Corps, South Pacific Division  
Trevor Baggione, Arizona Department of Environmental Quality  
Paul Hann, California State Water Resources Control Board  
Birgit Widegren, Nevada Division of Environmental Protection

## **Enclosure**

### **U.S. Environmental Protection Agency Region 9's Programmatic Clean Water Act Section 401 Certification of the 2020 Nationwide Permits for Projects on applicable Tribal Lands in California, Nevada, Arizona and Navajo Allottee Lands**

This Certification applies to any potential point source discharges from potential projects authorized under the proposed re-issuance of the following U.S. Army Corps of Engineers (Corps) CWA 404 Nationwide Permits (NWP) into waters of the United States that occur within applicable tribal lands in California, Nevada, Arizona and Navajo Allottee land in the corresponding Sacramento, San Francisco, Los Angeles and Albuquerque Corps Districts: NWP 3, 4, 5, 6, 7, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 25, 27, 29, 30, 31, 32, 33, 34, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 48, 49, 50, 51, 52, 53, 54, C, and D, and E. The Corps is not requesting certification for 11 NWPs: 1, 2, 8, 9, 10, 11, 24, 28, 35, A, and B.

Section 401(a)(1) of the CWA requires applicants for Federal permits and licenses that may result in discharges into waters of the United States, to obtain certification that any such discharges will comply with applicable provisions of the CWA, including Sections 301, 302, 303, 306 and 307. Where no state agency or tribe has authority to give such certification, U.S. Environmental Protection Agency (EPA) Region 9 is the certifying authority. In this case, the EPA is making the certification decision for potential discharges that may result from the projects authorized under the proposed Corps CWA 404 NWPs listed above.<sup>1</sup>

### **Project Description**

The Corps is proposing to re-issue its existing NWPs and associated general conditions and definitions, with some modifications. The Corps states that it is “proposing these modifications to simplify and clarify the NWPs, reduce burdens on the regulated public, and continue to comply with the statutory requirement that these NWPs authorize only activities with no more than minimal individual and cumulative adverse environmental effects.” 85 FR 57298. For more

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<sup>1</sup> This water quality certification does not apply to activities proceeding in the territories of the 23 tribes in Region 9 that have been approved as Section 401 certifying authorities —the Navajo Nation, Hualapai Tribe, Paiute-Shoshone of the Bishop Community, Big Pine Paiute-Shoshone Tribe, Twenty-Nine Palms Band of Mission Indians, Hoopa Valley Tribe, Hopi Tribe, Pyramid Lake Paiute Tribe, Dry Creek Rancheria of Pomo Indians, Pala Band of Mission Indians, Cortina Band of Wintun Indians, Walker River Paiute Tribe, Yerington Paiute, Duck Valley, Confederated Tribes of the Goshute Reservation, Gila River Indian Community, San Carlos Apache, Morongo Band of Mission Indians, Big Pine Paiute Tribe of the Owen Valley, Rincon Band of Luiseno Indians, Cabazon, Quartz Valley, Karuk and White Mountain Apache Tribe. In limited circumstances some lands within tribal boundaries fall outside a tribe's Section 401 certifying authority and are subject to this certification.

details: <https://www.usace.army.mil/Missions/Civil-Works/Regulatory-Program-and-Permits/Nationwide-Permits/>.

## **General Information**

The general information provided in this section does not constitute a certification condition(s).

The project proponents for potential projects authorized under the NWPs are responsible for obtaining all other permits, licenses, and certifications that may be required by federal, state, or tribal authorities.

Copies of this certification shall be kept on the job site and readily available for reference.

The project proponent for potential projects authorized under the NWP are encouraged to contact EPA Region 9 during the project planning phase if there are any questions about relevant best management practices (e.g., bioengineering techniques, biodegradable erosion control measures, revegetation using native plant species, suitable fill materials, and disposal of debris/construction materials preventing runoff) and resources that can assist with compliance.

Prior to work commencing, project proponents should notify the appropriate Tribal Environmental Office.

Project proponents for potential projects should also notify the appropriate Tribal Office and EPA Region 9 if spills or unauthorized discharges occur during the project.

Pursuant to CWA section 308(a), EPA Region 9 representatives are authorized to inspect the authorized activity and any mitigation areas to determine compliance with the terms and conditions of the NWP.

If you have questions regarding this certification, please contact EPA Region 9 at: [R9-401-Certs@epa.gov](mailto:R9-401-Certs@epa.gov).

## **Granted with Conditions (121.7(d)(2)):**

On behalf the 125 federally recognized tribes with tribal lands within Region 9, CWA Section 401 certification, for the following proposed NWPs, is granted with conditions. EPA Region 9 has determined that any discharge authorized under the following proposed NWPs will comply with water quality requirements, as defined at 40 CFR 121.1(n), subject to the following conditions pursuant to Section 401(d).

NWPs 5, 6, 7, 18, 19, 20, 23, 25, 27, 32, 33, 36, 37, 38, 41, 43, 45, 53, and E.

### **Condition 1 – Notification to EPA**

All applicants must provide notice to EPA Region 9 prior to commencing construction to provide EPA Region 9 with the opportunity to inspect the activity for the purposes of determining whether any discharge from the proposed project will violate this water quality certification. Where the Corps requires a PCN for the applicable NWP, the applicant should also provide the PCN to

Region 9. Within 30 days, EPA Region 9 will provide written verification to the applicant that the proposed project will not violate the water quality certification of the NWP.

***Why the condition is necessary to assure that any discharge authorized under the general license or permit will comply with water quality requirements:***

This condition is necessary to provide EPA Region 9 with notice and information to allow for an efficient and effective pre-operation inspection to determine if the certified discharge will violate the certification. If the project scope changes during the Corps review prior to initiation of the activity, it is also critical for EPA Region 9 to be provided any changes in the project design, scope, amount and location of discharges to inform the pre-operation inspection opportunity as provided by 40 CFR 121.11(a).

***Citation(s) that authorizes this condition:*** 40 CFR 121.11(a)

**Condition 2 – Projects or Activities Discharging to Impaired Waters**

Projects or activities are not authorized under the NWP if the project will involve point source discharge into an active channel of a water of the U.S. identified as a section 303(d) or TMDL listed impaired waterbody and the discharge may result in further exceedance of a specific parameter (e.g. total suspended solids, dissolved oxygen, temperature) for which the waterbody is listed. The current lists of 303(d) and TMDL listed waterbodies are available on EPA Region 9's web site at: <https://www.epa.gov/tmdl/impaired-waters-and-tmdls-pacific-southwest-region-9>.

***Why the condition is necessary to assure that any discharge authorized under the general license or permit will comply with water quality requirements:***

A 303(d) listed waterbody is impaired due to the cumulative effects of discharges of pollutants. The NWP does not provide necessary activity specific information to determine compliance with specific water quality requirements, such as limits on total suspended solids, temperature, dissolved oxygen, nutrients, or pH for which a specific waterbody could be listed as impaired. Site specific analysis is required to determine whether water quality requirements are met in the active channel of a water of the U.S. identified as a section 303(d) or TMDL listed impaired waterbody.<sup>2</sup>

***Citation(s) that authorizes this condition:*** CWA section 303(d)

**Denied (121.7(e)(2))**

On behalf of the 125 federally recognized tribes with tribal lands within EPA Region 9, EPA Region 9 cannot certify that the range of discharges from potential projects authorized under the following proposed NWP will comply with water quality requirements, as defined in 40 CFR 121.1(n). Therefore, CWA Section 401 water quality certification is denied for NWP 3, 12, 13, 14, 29, 39, 40, 42, 44, 51, C and D, and applicants must request an individual water quality certification, consistent with 40 CFR 121.5.

Certification denial is due to insufficient information. 40 CFR 121.7(e)(2)(iii). In EPA's unique role certifying on behalf of a tribe, in a tribal jurisdiction where EPA is not the regulator, EPA lacks important information about tribal water resources. In the case of the 125 federally

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<sup>2</sup>For example, Granite Creek in Arizona, a 303(d) listed as impaired for *e. coli*, runs through Yavapai Prescott Indian Reservation.

recognized tribes with tribal lands within EPA Region 9, EPA Region 9 lacks sufficient information on sensitive resources that may exist on these tribal lands, potential impaired waters on these tribal lands, and potential cultural importance of the water resources on these tribal lands. Additional information on these specific subjects would be needed for EPA Region 9 to assure that the range of discharges from potential projects authorized under NWPs 3, 12, 13, 14, 29, 39, 40, 42, 44, 51, C, and D will comply with water quality requirements, as defined in 40 CFR 121.1(n).

This information would also be necessary for EPA Region 9 to identify specific water quality requirements and evaluate whether the range of discharges from potential projects will comply with such requirements, in accordance with CWA section 401(a)(1) and 40 CFR 121.7(b). Lacking this information, EPA Region 9 is therefore denying certification.

### **Waived (121.9(a)(1)):**

On behalf of the 125 federally recognized tribes with tribal lands within U.S. Environmental Protection Agency (EPA) Region 9, EPA Region 9 is expressly waiving its authority to act on the CWA Section 401 certification request for the following proposed NWPs:

NWPs 4, 15, 16, 17, 21, 22, 30, 31, 34, 46, 48, 49, 50, 52, 54

**Summary Table – EPA Region 9 CWA § 401 Certification of NWPs**

NWP	Certification Status			NWPs the Corps is not Requesting Certification	Specific Conditions
	Certified with Conditions	Denial	Waived		
1				X	
2				X	
3		X			
4			X		
5	X				Notice to EPA, NWP not applicable to 303(d) listed waters
6	X				Notice to EPA, NWP not applicable to 303(d) listed waters
7	X				Notice to EPA, NWP not applicable to 303(d) listed waters
8				X	
9				X	
10				X	
11				X	
12		X			
13		X			
14		X			

15			X		
16			X		
17			X		
18	X				Notice to EPA, NWP not applicable to 303(d) listed waters
19	X				Notice to EPA, NWP not applicable to 303(d) listed waters
20	X				Notice to EPA, NWP not applicable to 303(d) listed waters
21			X		
22			X		
23	X				Notice to EPA, NWP not applicable to 303(d) listed waters
24				X	
25	X				Notice to EPA, NWP not applicable to 303(d) listed waters
26				Reserved. This NWP is no longer in use.	
27	X				Notice to EPA, NWP not applicable to 303(d) listed waters
28				X	
29		X			
30			X		
31			X		
32	X				Notice to EPA, NWP not applicable to 303(d) listed waters
33	X				Notice to EPA, NWP not applicable to 303(d) listed waters
34			X		
35				X	
36	X				Notice to EPA, NWP not applicable to 303(d) listed waters
37	X				Notice to EPA, NWP not applicable to 303(d) listed waters
38	X				Notice to EPA, NWP not applicable to 303(d) listed waters
39	X				Notice to EPA, NWP not applicable to 303(d) listed waters
40		X			
41	X				Notice to EPA, NWP not applicable to 303(d) listed waters
42		X			
43		X			
44		X			

USEPA Region 9 Programmatic CWA§401 Certification of the 2020 NWP for projects on applicable tribal lands

45	X				Notice to EPA, NWP not applicable to 303(d) listed waters
46			X		
47				Reserved. This NWP is no longer in use.	
48			X		
49			X		
50			X		
51		X			
52			X		
53	X				Notice to EPA, NWP not applicable to 303(d) listed waters
54			X		
A				X	
B				X	
C		X			
D		X			
E	X				Notice to EPA, NWP not applicable to 303(d) listed waters



**STATE OF UTAH  
DIVISION OF WATER QUALITY  
DEPARTMENT OF ENVIRONMENTAL QUALITY  
SALT LAKE CITY, UTAH**

**§401 Water Quality Certification No. DWQ-2020-10001**

**Applicant:** US Army Corps of Engineers  
Michael Jewell, Chief Regulatory Division  
Sacramento District  
1325 J Street  
Sacramento, CA 95814

**Project:** **On September 15, 2020**, the U.S. Army Corps of Engineers issued **85 FR 57298 Proposal to Reissue and Modify Nationwide Permits** proposing to reissue 52 existing nationwide permits (NWP) and issue five new NWP. NWP are general permits issued by the U.S. Army Corps of Engineers on a nationwide basis to streamline the authorization of certain activities under Section 404 of the Clean Water Act that result in no more than minimal individual and cumulative adverse environmental effects. Many of the proposed NWP require notification to the district engineer before commencing activities to ensure that the activities authorized by those NWP cause no more than minimal individual and cumulative adverse environmental effects.

**Location:** State of Utah

**Watercourse(s):** Waters of the United States (WOTUS)

**Request Date:** October 13, 2020

**Effective Date:** December 8, 2020

DWQ-2020-024910

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**Attachment 1:** Applicant/Project Proponent Resources

## I. Definitions

- 1.) **Blue Ribbon Fishery:** status administered by the Utah Division of Wildlife Resources and the Blue Ribbon Advisory Council that indicates the waterbody has high quality in the following attributes: fishing, outdoor experience, fish habitat, and economic benefits.
- 2.) **Category 1 Waters** are *"Waters which have been determined by the Board to be of exceptional recreational or ecological significance or have been determined to be a State or National resource requiring protection, shall be maintained at existing high quality through designation, by the Board after public hearing, as Category 1 Waters."* UAC R317-2-3.2
- 3.) **Category 2 Waters** *"are designated surface water segments which are treated as Category 1 Waters except that a point source discharge may be permitted provided that the discharge does not degrade existing water quality."* UAC R317-2-3.3
- 4.) **Designated Beneficial Uses:** means a water's present most reasonable uses, grouped by use classes to protect the uses against controllable pollution. Beneficial uses designated within each class are described in Utah Administrative Code (UAC) R317-2-6 and waterbodies beneficial uses can be found in UAC R317-2-13. For the purposes of this document, the term "designated beneficial uses" will be used to describe all uses required to be protected by Utah Water Quality Standards and Antidegradation Policy.
- 5.) **Director Notification and Review** means submittal of the U.S. Army Corps of Engineers (USACE) application and any supplemental attachments to the Utah Department of Environmental Quality (DEQ), Director of the Utah Division of Water Quality (DWQ) for review.
- 6.) **Existing Uses** *"means those uses actually attained in a water body on or after November 28, 1975, whether or not they are included in the water quality standards."* UAC R317-1-1. *"If a situation is found where there is an existing use which is a higher use (i.e., more stringent protection requirements) than that current designated use, the Director will apply the water quality standards and anti-degradation policy to protect the existing use."* UAC R317-2-3.
- 7.) **Project Proponent** *"means the applicant for license or permit or entity seeking certification."* 40 CFR §121.1
- 8.) **Total Maximum Daily Load (TMDL)-** *"means the maximum amount of a particular pollutant that a waterbody can receive and still meet state water quality standards, and an allocation of that amount to the pollutant's sources."* UAC R317-1-1
- 9.) **Waters of the United States (WOTUS)** means waterbodies subject to the provisions of the Clean Water Act.
- 10.) **303(d) list** is a state's list of impaired and threatened waters, including but not limited to; streams, lakes, and reservoirs adopted to implement the Clean Water Act Section 303(d).

## **II. Acronyms**

BMPs- Best Management Practices  
CWA- Clean Water Act  
DEQ- Utah Department of Environmental Quality  
DWQ – Utah Division of Water Quality  
NWP(s)- Nationwide Permit(s)  
PCN- Preconstruction Notification  
UAC- Utah Administrative Code  
USACE - U.S. Army Corps of Engineers  
TMDL – Total Maximum Daily Load  
WQS- Utah Water Quality Standards  
WOTUS- Waters of the United States

## **III. Executive Summary**

Pursuant to Section 401 of the Clean Water Act (CWA) 33 U.S.C. Section 1251 et seq., DWQ grants water quality certification to all USACE nationwide permits (NWPs) proposed by 85 FR 57298 except those that involve dam maintenance/rehabilitation or reservoir dewatering. Certification is subject to the conditions outlined in this document, adherence to the Sacramento Districts Regional Conditions, and adherence to any conditions outlined in the proposed NWPs. The conditions outlined in this certification are necessary to assure compliance with effluent limitations, monitoring requirements, and other applicable laws and regulations adopted for state primacy of the CWA. Condition justification and appropriate citations of Federal and State laws that authorize the condition, as required by 30 CFR Part 121.7, can be found in the section immediately following the conditions. In order to further assure compliance, DWQ reserves the right to request an individual certification for any project that is determined to have potential for significant adverse effects on water quality, potential to cause a violation of Utah Water Quality Standards (WQS) under UAC R317-2 or potential to degrade Waters of the United States (WOTUS), causing a violation of Utah Antidegradation Policy in UAC 317-2-3 in the State of Utah.

DWQ's conditions are based on and are necessary to comply with applicable state rules. Specifically, the following Utah Rules represent overarching considerations that require the conditions outlined by this document to apply to the USACE NWPs: Utah's rules promulgating standards of quality for waters of the State affirm "it shall be unlawful and a violation of these rules for any person to discharge or place any wastes or other substances in such manner as may interfere with designated uses protected by assigned classes or to cause any of the applicable standards to be violated" UAC R317-2-7.1.a. Additionally, "All actions to control waste discharges under these rules shall be modified as necessary to protect downstream designated uses." UAC R317-2-8. As stated in UAC R317-15-6.1 the Director will

ordinarily consider whether the proposed discharge “impairs the designated beneficial use classifications (e.g., aquatic life, drinking water, recreation) in Section R317-2-6” UAC R317-15-6.1.A.1., “exceeds water quality criteria, either narrative or numeric, in Section R317-2-7” UAC R317-15-6.1.A.2. or “fails to meet the antidegradation (ADR) requirements of Section R317-2-7” UAC R317-15-6.1.A.3

The Utah DWQ participated in a pre-filing meeting with the USACE on September 16, 2020, and received a formal 401 Certification request on October 13, 2020 from the USACE for the reissuance of the USACE NWP. Utah DWQ was informed that the reasonable period of time to make a certification decision was 60 days, which requires the DWQ to act by December 12, 2020.

The Utah DWQ requested a 19 day extension of the 60 day deadline to make a certification decision on October 15, 2020. The extension was requested because on September 11, 2020, the EPA finalized the “Clean Water Act Section 401 Certification Rule”, which had significant impact on Utah DWQ’s certification program. The DWQ requested the additional time to ensure that the certification decision met the new requirements outlined in 40 CFR Part 121.

The USACE denied Utah’s request for extension on October 23, 2020 and the DWQ was advised to act on the request by December 12, 2020.

#### **IV. Background**

NWPs authorize certain activities under Section 404 of the Clean Water Act and Section 10 of the Rivers and Harbors Act of 1899. The USACE is proposing to reissue its existing NWPs and associated general conditions and definitions, with some modifications. The USACE are also proposing to issue five new NWPs. The USACE is proposing to divide the current NWP that authorizes utility line activities (NWP 12) into three separate NWPs that address the differences in how different linear projects are constructed, the substances they convey, and the different standards and best management practices that help ensure those NWPs authorize only those activities that have no more than minimal adverse environmental effects. Specifically, we are proposing to modify the current utility line NWP 12 to authorize only oil and natural gas pipeline activities. Two proposed new NWPs would authorize activities associated with the construction, maintenance, repair, and removal of electric utility lines/telecommunication lines and utility lines that convey water, sewage, and other substances with the potential to pollute. The fifth proposed new NWP would authorize discharges of dredged or fill material into jurisdictional waters for the construction, expansion, and maintenance of water reuse and reclamation facilities. NWPs authorize only activities with no more than minimal individual and cumulative adverse environmental effects.

#### **V. Certification Conditions**

- 1.) The Project Proponent shall provide Director Notification and Review for the following projects in order to protect designated beneficial uses and assure that WQS are not violated:

- (a) Any project proposed under Nationwide Permits 3 (Maintenance) and 37 (Emergency Watershed Protection and Rehabilitation) and any project proposed under NWP 27 (Aquatic Habitat Restoration, Enhancement, and Establishment Activities) where PCN is required;
  - (b) Any proposed project that will be within 500 feet of the existing waters' edge of the Great Salt Lake, Utah Lake, and Bear Lake;
  - (c) Any project with a potential discharge is to an impaired waterbody with an approved Total Maximum Daily Load (TMDL), where the project has the potential to discharge a pollutant identified/ addressed by the TMDL;
  - (d) Any project with a potential discharge to *Category 1* or *Category 2* waters;
  - (e) Any project with a potential discharge where federal agencies are exempted from PCN normally required under the general permit in question.
- 2.) All activities with a potential discharge to WOTUS must implement and maintain best management practices (BMPs) to fully protect the waterbodies assigned beneficial use(s).
  - 3.) All activities shall not cause further degradation of impaired waterbodies- as defined in DWQ's most recent 303(d) list, regardless of whether a TMDL has been completed. The project proponent must review impairments on the waterbodies where the projects have potential to discharge and is responsible for ensuring that WQS are not exceeded and designated beneficial uses are not impaired.
  - 4.) Hazardous and otherwise deleterious materials (e.g. oil, gasoline, chemicals, trash, sawdust, etc.) shall not be stored, disposed of, or accumulated or conveyed through adjacent to or in immediate vicinity WOTUS unless adequate measures and controls are provided to ensure those materials will not enter WOTUS in the State of Utah. **Any spill or discharge of oil or other substance which may cause pollution to WOTUS in the State of Utah, including wetlands, must be immediately reported to the Utah DEQ Hotline at (801) 536-4123, a 24-hour phone number.**
  - 5.) All project proponents conducting activities in or immediately adjacent to WOTUS in the State of Utah with assigned class 1C (domestic drinking water) that are upstream 2 miles or less from any intake supply must notify the water supply operator and the local health department prior to commencement of work. If the water supply operator or the local health department recommends additional BMPs or monitoring, the project proponent must consider those recommendations in their project design.
  - 6.) All activities conducted in or immediately adjacent to WOTUS in the State of Utah with assigned beneficial use class 3A (cold water fishery) or has blue ribbon fishery designation must avoid removal of native riparian vegetation that provides stream shading to the maximum extent practicable. Any projects that approve removal of riparian vegetation that provides shade must require reestablishment of native vegetation that provides equal or greater shade. The project proponent shall provide successful reestablishment of native vegetation.

- 7.) All activities conducted in WOTUS in the State of Utah shall be conducted in the “dry” to the maximum extent practicable, by diverting flow utilizing cofferdams, berms constructed of sandbags, clean rock (containing no fine sediment) or other non-erodible, non-toxic material. All diversion materials shall be removed at the completion of the work. Project proponent shall consider conducting instream work during low flow conditions and work shall not be conducted during spawning season. Additionally, construction machinery shall not be operated within WOTUS in the State of Utah unless it is unavoidable, in which case it shall be conducted in the “dry” as stated above. The work shall be conducted in a manner to minimize the duration of the disturbance, turbidity increases, substrate disturbance, and minimize the removal of riparian vegetation. Construction machinery shall be clean to prevent the transfer of aquatic invasive species.

## **VI. Condition Justification and Citations**

- 1.) **Director Notification and Review** is a condition for projects identified in Part V(1) above which present an increased likelihood of jeopardizing designated beneficial uses or otherwise causing a violation of WQS, promulgated pursuant to Utah Code Sections 19-5-104, 19-5-110 and Section 303 of the Clean Water Act. Director Notification will allow the DWQ to consider water-body specific factors that are not otherwise considered by NWP. In support of cooperative federalism, the DWQ conditions approval of NWPs identified in Part V(1) above on Director notification, rather than denying all NWPs with potential adverse water quality impacts, to avoid unnecessary burden to applicants that would be associated with a blanket requirement for individual certification requests for all identified projects.

The opportunity to review specifically identified projects will allow the DWQ to assure that WQS will be met without automatically requiring a certification request to the Director directly from the project proponent. Director Notification would take substantially less time than requiring an individual certification request and associated pre-filing meeting. The Director will provide one of the following responses within two weeks;

- (i) The DWQ has determined the project will likely have minimal impact to water quality, pending the project proponent’s consideration of any written comments,

or in infrequent cases

- (ii) The DWQ has determined that the project requires individual certification to adequately protect designated beneficial uses, prevent violation of WQS, or prevent antidegradation. The DWQ reserves the right to require an individual 401 certification in rare circumstances where the DWQ determines there is a potential for adverse water quality impacts.

- (a) ***Projects Proposed Under Nationwide Permits 3, 27, and 37*** are conditioned on Director Notification and Review because they often involve removing built up debris and sediment or the release of sediment and as a result have the potential to result in discharges which threaten designated beneficial uses or may cause violation(s) of WQS for turbidity.

Projects issued under NWP 3 approve maintenance projects that often involve removal of sediment and debris which could then be released to WOTUS. Projects issued under NWP 27 approve projects that allow releasing sediment for Aquatic Habitat Restoration, Enhancement, and Establishment Activities.

Projects issued under NWP 37 approve projects for Emergency Watershed Protection and Rehabilitation and have potential for significant water quality impacts. In the past the DWQ reviewed these projects which often deal with rehabilitation of a waterbody after impacts from fire. These projects can often address increased sediment loads and debris in water channels because the riparian buffer is lost and there is increased runoff from the surrounding area. Projects issued under NWP 37 pose similar risks to those permitted under NWP 3 and 27.

Without proper precautions, projects under NWPs 3, 27 and 37 could result in significant increases in turbidity in the waterbody proposed for discharge. Numeric water quality criteria for turbidity in certain use designations could be violated if the project proponent does not take proper steps to minimize the increases. WQS for turbidity will be violated if there is an increase of 10 Nephelometric Turbidity Units (NTU) in waterbodies with designated beneficial uses related to recreation and if there is an increase of 10 NTUs (3A & 3B) or 15 NTUs (3C & 3D) in waterbodies with aquatic wildlife designated beneficial uses. UAC R317-2-14.1 and UAC R317-2-14.2.

In addition to violating numeric WQS, significant turbidity spikes or sediment deposits could cause a waterbody fail to meet all its designated beneficial uses or if large quantities of sediment are transported downstream, it could impact the downstream designated beneficial uses. The DWQ acknowledges that PCN is not always required under NWP 27, and only requests the requirement of Director Notification, when a PCN is required. As stated in UAC R317-15-6.1 the Director will ordinarily consider whether the proposed discharge *“impairs the designated beneficial use classifications (e.g., aquatic life, drinking water, recreation) in Section R317-2-6”* UAC R317-15-6.1.A.1., *“exceeds water quality criteria, either narrative or numeric, in Section R317-2-7”* UAC R317-15-6.1.A.2. or *“fails to meet the antidegradation (ADR) requirements of Section R317-2-7”* UAC R317-15-6.1.A.3

Citations: UAC R317-2-14.1, UAC R317-2-14.2., UAC R317-2-7.1.a., UAC R317-2-8. , UAC R317-15-6.1, UAC R317-15-6.1.A.1., UAC R317-15-6.1.A.2., UAC R317-15-6.1.A.3.



- (b) ***Projects within 500 feet of the Great Salt Lake, Utah Lake, and Bear Lake*** are conditioned on Director Notification and Review. The DWQ has determined that the Great Salt Lake, Utah Lake, and Bear Lake are unique waterbodies that require special attention and are at greater risk for potential adverse impacts when projects are within 500 feet of their existing water's edge. Utah Lake is the largest freshwater lake in Utah, the Great Salt Lake is the largest saline lake in the U.S. and provides habitat to migrating birds, and Bear Lake is well known for its recreation opportunities. When projects are being completed in close vicinity to these waterbodies, it poses increased risk of impacts to the designated uses for these waterbodies. Both Utah Lake and Bear lake have recreation designated use 2A (frequent primary contact recreation) and aquatic wildlife designated uses associated with either 3A cold water species of game fish (Bear Lake) or 3B warm water species of game fish. Both types of designated uses could be impacted by turbidity increases. Water quality criteria for turbidity will be violated if there is an increase of 10 NTUs in waterbodies with designated uses related to recreation and if there is an increase of 10 NTUs in aquatic wildlife designated use classes 3A and 3B. UAC R317-2-14.1 and UAC R317-2-14.2. Significant turbidity spikes or sediment deposits could cause a waterbody not to meet all its designated beneficial uses or if large quantities of sediment are transported downstream, it could impact the downstream beneficial uses. Utah's rules promulgating standards of quality for waters of the State affirm "it shall be unlawful and a violation of these rules for any person to discharge or place any wastes or other substances in such manner as may interfere with designated uses protected by assigned classes or to cause any of the applicable standards to be violated" UAC R317-2-7.1.a. As stated in UAC R317-15-6.1 the Director will ordinarily consider whether the proposed discharge "impairs the designated beneficial use classifications (e.g., aquatic life, drinking water, recreation) in Section R317-2-6" UAC R317-15-6.1.A.1., "exceeds water quality criteria, either narrative or numeric, in Section R317-2-7" UAC R317-15-6.1.A.2. or "fails to meet the antidegradation (ADR) requirements of Section R317-2-7" UAC R317-15-6.1.A.3. when making a certification decision.

Citation(s): UAC R317-2-14.1, UAC R317-2-14.2., UAC R317-2-7.1.a., UAC R317-15-6.1, UAC R317-15-6.1.A.1., UAC R317-15-6.1.A.2., UAC R317-15-6.1.A.3.

- (c) ***Projects with potential discharge to an impaired waterbody with an approved Total Maximum Daily Load (TMDL), where the project has the potential to discharge a pollutant identified/ addressed by the TMDL*** are conditioned on Director Notification and Review. A total maximum daily load or *TMDL* "means the maximum amount of a particular pollutant that a waterbody can receive and still meet WQS, and an allocation of that amount to the pollutant's sources." UAC R317-1-1. When a waterbody is impaired and listed on the 303(d) list, states are required to create and implement TMDLs for the specific waterbody to restore water quality. Waters on Utah's most up to date 303(d) list are not currently meeting their designated beneficial uses. According to Utah's Final 2016 Integrated Report<sup>1</sup> the waters identified as impaired are not meeting their designated beneficial uses because "the concentration of the pollutant- or several pollutants- exceeds numeric water quality criteria, or quantitative biological assessments indicate that the biological designated uses are not

<sup>1</sup> <https://documents.deq.utah.gov/water-quality/monitoring-reporting/integrated-report/DWQ-2017-004941.pdf>

supported (Narrative water quality standards are violated).” TMDLs are created to limit discharges to the waterbody with the goal of meeting designated beneficial uses. If project proponents do not adhere to the BMPs and pollutant reduction requirements identified in approved TMDLs (as applicable) then there may be a violation of WQS and designated beneficial uses could be further impacted. If the potential discharge contains pollutants/parameters that are included in an approved TMDL, the project proponent must take extra precautions, as identified in the TMDL, to minimize and prevent discharges that could further degrade the waterbodies, and prevent the waterbodies from meeting its designated beneficial and existing uses. Director notification and review of projects with the potential to discharge to impaired water bodies with approved TMDLs will ensure consistency with TMDL requirements and goals.

Citation(s): UAC R317-1, UAC R317-2-7.1.a., UAC R317-15-6.1, UAC R317-15-6.1.A.1., UAC R317-15-6.1.A.2., UAC R317-15-6.1.A.3.

- (d) ***Projects with potential discharges to Category 1 and Category 2 waters*** are conditioned on Director Notification and Review in order to ensure that the Utah DWQ’s Antidegradation Policies are being implemented effectively. Category 1 waters are “waters which have been determined by the Board to be of exceptional recreational or ecological significance or have been determined to be a State or National resource requiring protection, shall be maintained at existing high quality through designation, by the Board after public hearing, as Category 1 Waters.” UAC R317-2-3.2. Category 2 waters “are designated surface water segments which are treated as Category 1 Waters except that a point source discharge may be permitted provided that the discharge does not degrade existing water quality.” UAC R317-2-3.3. Discharges may be allowed in Category 1 and Category 2 waters “where pollution will be temporary and limited after consideration of the factors in UAC R317-2-.3.5.b.4., and where best management practices will be employed to minimize pollution effects.” UAC R317-2-3.2 and UAC R317-2-3.3.

Although NWP’s are typically issued for projects with minimal impacts to water quality, the NWP’s do not take into consideration the quality of the water affected. In order to comply with the Antidegradation Policy outlined by UAC R317-2-3.5.b.4, requiring that pollution to Category 1 and Category 2 waters be temporary and limited, the DWQ must review all projects with the potential to discharge to those waters. Without the ability to review the individual projects proposing to discharge to Category 1 and Category 2 waters, the DWQ cannot assure that they will meet the antidegradation policy or other applicable water quality requirements. As stated in UAC R317-15-6.1 the Director will ordinarily consider whether the proposed discharge “impairs the designated beneficial use classifications (e.g., aquatic life, drinking water, recreation) in Section R317-2-6” UAC R317-15-6.1.A.1., “exceeds water quality criteria, either narrative or numeric, in Section R317-2-7” UAC R317-15-6.1.A.2. or “fails to meet the antidegradation (ADR) requirements of Section R317-2-7” UAC R317-15-6.1.A.3 when making a certification decision.

Citation(s): UAC R317-2-3.2., UAC R317-2-3.3. , UAC R317-15-6.1, UAC R317-15-6.1.A.1., UAC R317-15-6.1.A.2., UAC R317-15-6.1.A.3.

- (e) *Projects that exempt federal agencies from providing PCN where PCN is required for other entities* are conditioned on Director Notice and Review. Federal agencies that are seeking NWP, should be held to the same standards as other project proponents. Not all federal agencies have staffs that are environmental experts when it comes to water quality. The DWQ is concerned that failure for federal agencies to submit PCNs and receive oversight from the USACE or DWQ, could result in greater than minimal impacts to water quality, exceedance of WQS, and/or violation of antidegradation requirements. Federal agencies are not exempt for meeting WQS and may not always be able to ensure that WQS are met without any oversight from an entity that can provide water quality expertise.

Citation(s): UAC R317-2-14.1, UAC R317-2-14.2., UAC R317-2-7.1.a., UAC R317-15-6.1, UAC R317-15-6.1.A.1., UAC R317-15-6.1.A.2., UAC R317-15-6.1.A.3.

- 2.) **Implementation of Best Management Practices.** Project approval is conditioned on implementation of BMPs, which are required to be implemented by the Antidegradation Policy in UAC R317-2-3, WQS may be violated unless appropriate best management practices (BMPs) are incorporated to minimize the erosion-sediment and nutrient load. Violations of WQS could cause a waterbody to fail to meet its designated beneficial uses. As required by Utah's Antidegradation policy UAC R317-2-3.1 "Existing instream water uses shall be maintained and protected. No water quality degradation is allowable which would interfere with or become injurious to existing instream water uses." As stated in UAC R317-15-6.1 the Director will ordinarily consider whether the proposed discharge "impairs the designated beneficial use classifications (e.g., aquatic life, drinking water, recreation) in Section R317-2-6" UAC R317-15-6.1.A.1., "exceeds water quality criteria, either narrative or numeric, in Section R317-2-7" UAC R317-15-6.1.A.2. or "fails to meet the antidegradation (ADR) requirements of Section R317-2-7" UAC R317-15-6.1.A.3 when making a certification decision. If appropriate BMPs are incorporated, there is assurance that the project will not violate WQS or impair a waterbody's beneficial use. See Attachment 1 for resources on identifying beneficial uses for WOTUS in the State of Utah and Construction Site BMPs.

Citation(s): UAC R317-2-3.1, UAC R317-15-6.1, UAC R317-15-6.1.A.1., UAC R317-15-6.1.A.2., UAC R317-15-6.1.A.3.

- 3.) **Protection of Impaired Waterbodies.** Waters that are impaired and conjunctively on Utah's most up to date 303(d) list are not currently meeting their designated beneficial uses. According to Utah's Final 2016 Integrated Report<sup>1</sup> the waters identified as impaired are not meeting their designated beneficial uses because "the concentration of the pollutant- or several pollutants-exceeds numeric water quality criteria, or quantitative biological assessments indicate that the biological designated uses are not supported (Narrative water quality standards are violated)." Utah's antidegradation policy states "existing instream water uses shall be maintained and protected. No water quality degradation is allowable which would interfere with or become injurious to existing instream water uses." UAC R317-2-3.1. In order to ensure that proposed activities meet Utah's antidegradation and that discharges do not further degrade water quality the project proponent needs to be aware of the waterbodies assessment, more specifically if the

<sup>1</sup> <https://documents.deq.utah.gov/water-quality/monitoring-reporting/integrated-report/DWQ-2017-004941.pdf>

waterbody is impaired and listed on Utah's most current 303(d) list. If the potential discharge contains pollutants/ parameters that the waterbody is listed as impaired for, the project proponent needs to take extra precautions to minimize and prevent discharges that could further degrade the waterbodies and prevent the waterbodies from meeting its beneficial and existing uses. Typical pollutants associated with USACE Section 404 permits (e.g. sediment), especially when a waterbodies proposed for discharge is impaired could cause applicable WQS to be violated, if appropriate measures are taken." As stated in UAC R317-15-6.1 the Director will ordinarily consider whether the proposed discharge "impairs the designated beneficial use classifications (e.g., aquatic life, drinking water, recreation) in Section R317-2-6" UAC R317-15-6.1.A.1., "exceeds water quality criteria, either narrative or numeric, in Section R317-2-7" UAC R317-15-6.1.A.2. or "fails to meet the antidegradation (ADR) requirements of Section R317-2-7" UAC R317-15-6.1.A.3. when making a certification decision.

Citation(s): UAC R317-2-3.1, UAC R317-2.1.a., UAC R317-15-6.1, UAC R317-15-6.1.A.1., UAC R317-15-6.1.A.2., UAC R317-15-6.1.A.3.

- 4.) **Proper Storage of Hazardous and Otherwise Deleterious Materials.** Project approval is conditioned on proper storage of hazardous and otherwise deleterious materials, and notification of any discharge of those materials, to assure that water quality and narrative standards are not violated. When projects are occurring in or around waterbodies, there is a chance for pollutants to inadvertently be spilled/discharged into waterbodies due to increased risk from project related activities (e.g. presence of machinery, onsite chemical and gas storage, improper waste storage, and failure to use proper BMPs). To prevent or reduce the possibility that hazardous and otherwise deleterious materials are inadvertently discharged into a waterbody, project proponents must not store, dispose of, or accumulated such materials adjacent to or in immediate vicinity of WOTUS unless adequate measures and controls are provided to ensure those materials will not enter waters of the state. If there is a discharge to WOTUS in the State of Utah, it must be immediately reported to the DEQ, as stated in Utah Code §19-5-114. An inadvertent discharge of pollutants can cause violations with Utah's Narrative Standards, which states "It shall be unlawful, and a violation of these rules, for any person to discharge or place any waste or other substance in such a way as will be or may become offensive such as unnatural deposits, floating debris, oil, scum or other nuisances such as color, odor or taste; or cause conditions which produce undesirable aquatic life or which produce objectionable tastes in edible aquatic organisms; or result in concentrations or combinations of substances which produce undesirable physiological responses in desirable resident fish, or other desirable aquatic life, or undesirable human health effects, as determined by bioassay or other tests performed in accordance with standard procedures; or determined by biological assessments in Subsection R317-2-7.3." UAC R317-3-7.2. Utah's rules promulgating standards of quality for waters of the State affirm "it shall be unlawful and a violation of these rules for any person to discharge or place any wastes or other substances in such manner as may interfere with designated uses protected by assigned classes or to cause any of the applicable standards to be violated." UAC R317-2-7.1.a. Discharges of pollutants, even inadvertently, could cause both a violation of applicable water quality standards and possibly interfere with a waterbodies designated uses.

Citation(s): Utah Code § 19-5-114, UAC R317-3-7.2, UAC R317-2-7.1.a, UAC R317-15-6.1., UAC R317-15-6.1.A.1., UAC R317-15-6.1A.2.

- 5.) **Notification to water supply operators and local health departments** is a condition of project approval for all projects in or immediately adjacent to WOTUS with assigned class 1C for domestic drinking water upstream two miles or less from any intake supply. NWP general permit condition 7 as described in 80 FR 57298, 57386 states "no activity may occur in the proximity of a public water supply intake, except where the activity is for the repair or improvement of public water supply intake structures or adjacent bank stabilization." The DWQ has determined that this condition is not specific enough to protect of beneficial use class 1C (Protected for domestic purposes with prior treatment by treatment processes as required by the Utah Division of Drinking Water) because it fails to provide an exact distance. As stated in Utah's Antidegradation Policy UAC R317-2-3.5.d "depending upon the locations of the discharge and its proximity to downstream drinking water diversions, additional treatment or more stringent effluent limits or additional monitoring, beyond that which may otherwise be required to meet minimum technology standards or in stream WQS, may be required by the Director in order to adequately protect public health and the environment." "The additional treatment/effluent limits/monitoring which may be required will be determined by the Director after consultation with the Division of Drinking Water and the downstream drinking water users." UAC R317-2-3.5.d. These additional requirements are necessary to ensure that beneficial use class 1C is maintained in the waterbody proposed for discharge or in some cases, protection of the downstream waterbodies designated beneficial use, when classified as 1C. Should the project proponent refuse to work with the local health department and water supply operators, the Director may request an individual certification request and issue additional requirements in consultation with the operator, the public health departments, and the Division of Drinking water in order to maintain the designated beneficial use.

Citation(s): UAC R317-2-3.5.d, UAC R317-2-7.1.a, UAC R317-2-8., UAC R317-15-6.1, UAC R317-15-6.1.A.1, UAC R317-15-6.1A.2., UAC R317-15-6.1.A.3

- 6.) **Vegetation Preservation and Reestablishment in fisheries.** Project approval is conditioned on avoiding vegetation removal to the maximum extent practicable in or immediately adjacent to WOTUS used as fisheries in order to maintain existing beneficial use. Waterbodies with beneficial use class 3A (cold water fishery) or waterbodies with a blue ribbon fishery designation rely heavily on the available stream cover/shade to maintain designated beneficial uses. Riparian vegetation supplies necessary shade to stabilize water temperatures in streams. Removal of riparian vegetation, without reestablishment could cause a waterbody not to maintain beneficial use 3A or its blue river fishery designation. Utah's antidegradation policy states "existing instream water uses shall be maintained and protected. No water quality degradation is allowable which would interfere with or become injurious to existing instream water uses." UAC R317-2-3.1. Failure to minimize riparian vegetation removal and failure to reestablish riparian vegetation which results in the failure to maintain beneficial use class 3A would be considered a violation of Utah's rules promulgating standards of quality for waters of the State, more specifically Utah's antidegradation policy found at UAC R317-2-3. Additionally, the loss of riparian vegetation

could cause a violation of the instream numeric criteria for temperature, which is listed as 20°C with a max temperature change of 2°C for beneficial use class 3A. UAC R317-2-14.2. If the temperature of the waterbody increases, there is a potential for instream water quality criteria for dissolved oxygen (DO) to be violated. Temperature and DO have an inverse relationship, where temperature increases then DO decreases, so an increase in temperature could cause a decrease in DO, and possibly a violation of the instream criteria for DO which for beneficial use class 3A is a minimum of 8.0 mg/L when early life stages are present and 4.0 mg/L when all other life stages are present. UAC R317-2-14.2. As stated in UAC R317-15-6.1 the Director will ordinarily consider whether the proposed discharge “impairs the designated beneficial use classifications (e.g., aquatic life, drinking water, recreation) in Section R317-2-6” UAC R317-15-6.1.A.1., “exceeds water quality criteria, either narrative or numeric, in Section R317-2-7” UAC R317-15-6.1.A.2. or “fails to meet the antidegradation (ADR) requirements of Section R317-2-7” UAC R317-15-6.1.A.3 when making a certification decision.

Citation(s): UAC R317-2-3.1., UAC R317-2-3., UAC R317-2-14.2., UAC R317-2-14.2., UAC R317-15-6.1, UAC R317-15-6.1.A.1, UAC R317-15-6.1.A.2., UAC R317-15-6.1.A.3.

- 7.) **Dry Conditions to the Maximum Extent Practicable.** Project approval is conditioned on conducting activities under dry conditions to the maximum extent practicable to assure that WQS are not exceeded. DWQ acknowledges that some of the NWP general permit conditions encourage activities to be conducted under dry conditions, but the conditions do not go far enough to provide reasonable assurance of compliance with applicable WQS, particularly in Utah where dry conditions can be reasonably achieved. NWP general permit conditions 3, 11, and 12 partially address concerns the DWQ has, but are ultimately insufficient. NWP general condition 3 as described in 80 FR 57298, 57385 states “*activities in spawning areas during spawning seasons must be avoided to the maximum extent practicable. Activities that result in the physical destruction (e.g., through excavation, fill, or downstream smothering by substantial turbidity) of an important spawning area are not authorized*”, condition 11 as described in 80 FR 57298, 57386 states “*heavy equipment working in wetlands or mudflats must be placed on mats, or other measures must be taken to minimize soil disturbance*” and condition 12 as described in 80 FR 57298, 57386 states “*appropriate soil erosion and sediment controls must be used and maintained in effective operating condition during construction, and all exposed soil and other fills, as well as any work below the ordinary high water mark or high tide line, must be permanently stabilized at the earliest practicable date. Permittees are encouraged to perform work within waters of the United States during periods of low-flow or no-flow, or during low tides.*”

General condition 3 as written does not adequately protect fish spawning, as required by Utah WQS and Antidegradation Policy. Certain activities/discharges (e.g. sediment discharges, streambed alteration, streambank alteration (fish habitat)) permitted through a USACE Section 404 permit to waterbodies during spawning season (in a waterbody where spawning may occur), will likely impact fish spawning. Activities/ discharges approved through a USACE Section 404 permit could have significant impacts to turbidity, DO, temperature, available substrate, and available habitat, which subsequently can have significant impacts to spawning. The impairment

of fish spawning is not considered a temporary and limited impact and therefore does not meet Utah's antidegradation policy found in UAC R317-2-3.5. An impairment of fish spawning may also impact whether the waterbody can maintain its designated beneficial uses, as it relates to aquatic wildlife use classes. Utah's rules promulgating standards of quality for waters of the State affirm "it shall be unlawful and a violation of these rules for any person to discharge or place any wastes or other substances in such manner as may interfere with designated uses protected by assigned classes or to cause any of the applicable standards to be violated" UAC R317-2-7.1.a.

General conditions 11 and 12, as stated above, do begin to address the use of machinery and timing of projects in WOTUS in the State of Utah, but additional conditions are necessary to meet Utah WQS. Condition 11 addresses work being conducted in wetlands that are considered WOTUS in the State of Utah, but does not address machinery use in open waterbodies or streams. Construction machinery used within a waterbody can cause significant impacts to water quality if adequate precautions are not taken. When it is unavoidable to operate construction machinery within the waterbody the project proponent should focus on minimizing the duration of the disturbance, turbidity increase, substrate disturbance, removal of riparian vegetation, and work shall be conducted in the "dry" to the maximum extent practicable. Minimizing the duration of impact reduces the chance that the impacts will accumulate and cause significant impacts to water quality. Minimizing turbidity increases is important because the State of Utah has numeric water quality criteria for turbidity in certain use designations, which could be violated if the project proponent does not take proper steps to minimize the increases. Water quality criteria for turbidity will be violated if there is an increase of 10 NTUs in waterbodies with designated uses related to recreation and if there is an increase of 10 NTUs (3A & 3B) or 15 NTUs (3C & 3D) in waterbodies with aquatic wildlife designated uses. UAC R317-2-14.1 and UAC R317-2-14.2. Conducting work in the "dry" to the maximum extent practicable will help reduce the risk of the numeric criteria for turbidity to be exceeded, as well as reduce the risk of a significant sediment load being transported downstream. Discharges of sediment can not only violate numeric criteria, but also, risk violating Utah's narrative standard "It shall be unlawful, and a violation of these rules, for any person to discharge or place any waste or other substance in such a way as will be or may become offensive such as unnatural deposits, floating debris, oil, scum or other nuisances such as color, odor or taste; or cause conditions which produce undesirable aquatic life or which produce objectionable tastes in edible aquatic organisms; or result in concentrations or combinations of substances which produce undesirable physiological responses in desirable resident fish, or other desirable aquatic life, or undesirable human health effects, as determined by bioassay or other tests performed in accordance with standard procedures; or determined by biological assessments in Subsection R317-2-7.3." UAC R317-2-7.2. Violations of numeric and narrative criteria could cause a waterbody not to meet its designated beneficial use and a transport of sediment downstream could prevent a downstream waterbody from meeting its designated beneficial uses. As required by Utah's Antidegradation policy UAC R317-2-3.1 "Existing instream water uses shall be maintained and protected. No water quality degradation is allowable which would interfere with or become injurious to existing instream water uses.". Additionally, "All actions to control waste discharges under these rules shall be modified as necessary to protect downstream designated uses." UAC R317-2-8. As stated in UAC R317-15-6.1 the Director will ordinarily consider whether the proposed discharge "impairs the designated

beneficial use classifications (e.g., aquatic life, drinking water, recreation) in Section R317-2-6” UAC R317-15-6.1.A.1., “exceeds water quality criteria, either narrative or numeric, in Section R317-2-7” UAC R317-15-6.1.A.2. or “fails to meet the antidegradation (ADR) requirements of Section R317-2-7” UAC R317-15-6.1.A.3 when making a certification decision.

Citation(s): UAC R317-2-3.5. , UAC R317-2-7.1.a., UAC R317-2-14.1, UAC R317-2-14.2., UAC R317-2-7.1.a., UAC R317-2-7.2. , UAC R317-2-3.1, UAC R317-2-8. , UAC R317-15-6.1, UAC R317-15-6.1.A.1, UAC R317-15-6.1.A.2., UAC R317-15-6.1.A.3.

## VII. Denials

**NWPs for Projects that involve dam maintenance/rehabilitation or reservoir dewatering are denied and must apply for individual certification from the Director** because they have the potential to discharge massive amounts of sediment if not properly regulated and administered. As stated in justification1a, the DWQ has concerns with projects that have potential to discharge large quantities of sediment into waterbodies. Projects such as dam maintenance/rehabilitation or reservoir dewatering that involve potential release of large quantities of sediment, either as part of project activities or inadvertently, have potential for catastrophic impacts to water quality. For example, in August 2016, the Tibble Fork Dam had an unplanned release of approximately 8,700 cubic yards of sediment from the Tibble Fork Reservoir into the North Fork of the American Fork River, causing a fish kill of about 5,250 fish. Samples taken revealed sediment concentrations of heavy metals (arsenic, cadmium, lead, and Zinc) in excess of EPA Region 3 Freshwater Sediment Screening Values for aquatic life and human health-based concentration for lead. The project had been permitted under a USACE Section 404 NWP; but the DWQ was unaware of the project. If the DWQ had the opportunity to review the project prior to USACE NWP issuance, impacts may have been prevented or at least minimized by adding project-specific conditions or additional oversight to the project. To avoid future violations and catastrophic releases, the DWQ is requiring individual permits for these types of projects.

Citation(s): UAC R317-2-14.1, UAC R317-2-14.2., UAC R317-2-7.1.a., UAC R317-2-8. , UAC R317-15-6.1, UAC R317-15-6.1.A.1., UAC R317-15-6.1.A.2., UAC R317-15-6.1.A.3.



## VIII. Disclaimers

- 1.) This Section 401 Certification does not preclude the applicant's responsibility to comply with all applicable Federal, State or local laws, regulations or ordinances, including WQS. Permit coverage does not release the applicant from any liability or penalty, should violations to the permit terms and conditions or Federal or State Laws occur.
- 2.) Applicants must acquire all necessary easements, access authorizations and permits to ensure they are able to implement the project. This Section 401 Certification does not convey any property rights or exclusive privileges, nor does it authorize access or injury to private property.

## IX. Public Notice and Comments

- 1.) **Public Notice Dates:** November 5, 2020 – December 7, 2020
- 2.) **Public Notice Comments, Response, and Actions:** The NWP 401 Certification received one comment.
  - (a) Comment 1
    - Comment 1: The USACE requested that "USACE" be replaced with "prospective permittee" or "project proponent" when referring to condition requirements.
    - Comment 1 Response: The USACE was advised that the request was reasonable and would be considered during finalization of the Certification.
    - Comment 1 Action: The DWQ replaced "USACE" with "project proponent" in two locations at the request of the USACE. The changes were not significant and overall did not impact the conditions. Since this change was not considered major, the Certification will not be Public Noticed again.
- 3.) During finalization of the Certification certain dates, spelling edits, and minor language or formatting corrections may have been completed. Due to the nature of these changes they were not considered major and the Certification will not be Public Noticed again.

**X. Water Quality Certification**

The Utah Division of Water Quality Certifies that if projects issued under the USACE Nationwide Permits adhere to the conditions outlined in this certification, adhere to Sacramento Districts Regional Conditions, and adhere to any conditions outlined in the proposed NWP then the projects will comply with water quality requirements and applicable provisions of the Clean Water Act sections 301 (Effluent Limitations), 302 (Water Quality Related Effluent Limitations), 303(Water Quality Standards and Implementation Plans), 306(National Standards of Performance), and 307 (Toxic and Pretreatment Effluent Standards).



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Erica Brown Gaddis PhD, Director

12/08/2020

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Date

## **XI. References**

Division of Water Quality. 2016. Utah's Final 2016 Integrated Report. Salt lake City, Utah. Utah Department of Environmental Quality.

Available at: <https://documents.deq.utah.gov/water-quality/monitoring-reporting/integrated-report/DWQ-2017-004941.pdf>

Proposal To Reissue and Modify Nationwide Permits, 85 FR 57298 (September 15, 2020).

Available at: <https://www.federalregister.gov/documents/2020/09/15/2020-17116/proposal-to-reissue-and-modify-nationwide-permits>

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## Attachment 1: Project Proponent Resources

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### **Project Proponent Resources**

Best Management Practices for Construction Sites: <https://deq.utah.gov/sbeap/best-management-practices-for-construction-sites>

Utah DEQ Interactive Map: <https://enviro.deq.utah.gov/>

EPA's Final "Clean Water Act Section 401 Certification Rule" :  
[https://www.epa.gov/sites/production/files/2020-07/documents/clean\\_water\\_act\\_section\\_401\\_certification\\_rule.pdf](https://www.epa.gov/sites/production/files/2020-07/documents/clean_water_act_section_401_certification_rule.pdf)

Approved TMDLs in the State of Utah: <https://deq.utah.gov/water-quality/watershed-monitoring-program/approved-tmdls-watershed-management-program>



**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY**

**REGION 8**

1595 Wynkoop Street  
Denver, CO 80202-1129  
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[www.epa.gov/region8](http://www.epa.gov/region8)

October 12, 2021

Ref: 8WD-CWB

**SENT VIA EMAIL  
DIGITAL READ RECEIPT REQUESTED**

Colonel James J. Handura  
U.S. Army Corps of Engineers  
Sacramento District  
1325 J Street, Room 1480  
Sacramento, California 95814

Re: Clean Water Act § 401 Certification of the U.S. Army Corps of Engineers proposed 2021 Nationwide Permits for Indian country in Utah (except Indian country lands of the Navajo Nation and the Confederated Tribes of the Goshute Reservation)

Dear Col. Handura:

The U.S. Environmental Protection Agency, Region 8 (EPA) received the U.S. Army Corps of Engineers, Sacramento District, requests for water quality certification under § 401 of the Clean Water Act (CWA) for the proposed Nationwide Permits (NWP) that may result in a discharge in waters of the United States on Indian country<sup>1</sup> lands within the state of Utah.<sup>2</sup> We reviewed the September 15, 2020, Federal Register<sup>3</sup> notice announcing the reissuance of the NWP, along with the regional conditions proposed for Sacramento District. In a letter dated December 12, 2020, EPA transmitted our certification decisions for these general permits. On January 13, 2021, the Corps published in the Federal Register its final rule reissuing 12 NWP and issuing 4 new NWP, as well as the NWP general conditions and definitions.<sup>4</sup>

The Corps is now preparing to issue a final rule for the remaining 41 NWP (reissuing 40 existing NWP and one new NWP). For these 41 NWP, the Corps has extended the reasonable

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<sup>1</sup>Indian country is defined at 18 U.S.C. § 1151.

<sup>2</sup> Indian country in Utah generally includes: (1) lands within the exterior boundaries of the following Indian reservations located within Utah, in part or in full: the Goshute Reservation, the Navajo Indian Reservation, the reservation lands of the Paiute Indian Tribe of Utah (Cedar Band of Paiutes, Kanosh Band of Paiutes, Koosharem Band of Paiutes, Indian Peaks Band of Paiutes, and Shivwits Band of Paiutes), the Skull Valley Indian Reservation, the Uintah and Ouray Reservation (subject to federal court decisions removing certain lands from Indian country status within the Uintah and Ouray Reservation), and the Washakie Reservation; (2) any land held in trust by the United States for an Indian tribe; and (3) any other areas that are "Indian country" within the meaning of 18 U.S.C. section 1151.

<sup>3</sup> See 85 FR 57298.

<sup>4</sup> See 86 FR 2744.



period of time within which CWA § 401 certifying authorities must act and has provided the opportunity for those certifying authorities to revise or reconsider their prior CWA § 401 certification decisions.<sup>5</sup> This letter transmits our revised certification decisions for these 41 NWP's. EPA's December 12, 2021 certification decisions still apply to the 16 NWP's that were finalized in January 2021.<sup>6</sup>

This certification applies to any potential point source discharges from potential projects authorized under the proposed NWP's into waters of the United States that occur on the reservations of the following tribes, or any other Indian country lands within the State of Utah where EPA is the certifying authority (except Indian country lands of the Navajo Nation and the Confederated Tribes of the Goshute Reservation<sup>7</sup>): the Paiute Indian Tribe of Utah, the Skull Valley Band of Goshute Indians of Utah, the Northwestern Band of the Shoshone Nation, the Ute Mountain Ute Tribe, and the Ute Indian Tribe. Section 401(a)(1) of the Clean Water Act requires applicants for Federal permits and licenses that may result in discharges into waters of the United States to obtain certification that potential discharges will comply with applicable provisions of the CWA, including Sections 301, 302, 303, 306 and 307. Where no state agency or tribe has authority to give such certification, EPA is the certifying authority. Presently, the Paiute Indian Tribe of Utah, the Skull Valley Band of Goshute Indians of Utah, the Northwestern Band of the Shoshone Nation, the Ute Mountain Ute Tribe (except as noted in the footnote below),<sup>8</sup> and the Ute Indian Tribe do not have the authority to provide CWA § 401 certification for discharges occurring within Indian country lands of those Tribes; therefore, the EPA is making the certification decisions for discharges that may result from the proposed NWP's.<sup>9</sup>

In summary, EPA is certifying 24 of the 41 NWP's with conditions. We are waiving 3 NWP's, denying certification for 5 NWP's, and taking no action on 9 NWP's. These requirements will protect water quality and help ensure that the NWP program minimizes adverse impacts on the aquatic environment on Indian country lands, both individually and cumulatively, as required by CWA Section 404(e). If a project is unable to meet the enclosed conditions, or if certification is denied for an applicable NWP, the applicant may request an individual certification from EPA. An individual certification request must follow the requirements outlined in § 121.5 of EPA's CWA § 401 Certification Rule, effective September 11, 2020.

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<sup>5</sup> [https://www.epa.gov/system/files/documents/2021-08/8-19-21-joint-epa-army-memo-on-cwa-401-implementation\\_508.pdf](https://www.epa.gov/system/files/documents/2021-08/8-19-21-joint-epa-army-memo-on-cwa-401-implementation_508.pdf).

<sup>6</sup> NWP's 12, 21, 29, 39, 40, 42, 43, 44, 48, 50, 51, 52, A (55), B (56), C (57), and D (58) were reissued in January 2021. 86 FR 2744. EPA denied certification for all of these NWP's, except NWP 48, for which EPA expressly waived certification authority.

<sup>7</sup> EPA Region 9 implements EPA programs, such as the Clean Water Act section 401 water quality certification program, for the Indian country lands of the Navajo Nation and the Confederated Tribes of the Goshute Reservation, and therefore this certification does not pertain to those Indian country lands.

<sup>8</sup> The Ute Mountain Ute Tribe has been approved by EPA to administer the Clean Water Act section 401 water quality certification program on most, but not all, of the lands held in trust by the United States for the Tribe in the State of Utah. Therefore, the Tribe (not EPA) is the certifying authority for those approved tribal trust lands. Please contact EPA Region 8 for further identification of those lands.

<sup>9</sup> It is the responsibility of the applicant to determine the proper CWA § 401 authority through coordination and recommendations of land status through EPA or certification of land status by the U.S. Department of the Interior Bureau of Indian Affairs.

Thank you for your ongoing partnership in implementing the regulatory programs of the CWA. Please contact me at (303) 312-6395 if you have any questions, or your staff may contact Toney Ott at 303-312-6909, [ott.toney@epa.gov](mailto:ott.toney@epa.gov), or Aaron Blair at 303-312-6883, [blair.aaron@epa.gov](mailto:blair.aaron@epa.gov), if there are any questions or if clarification is necessary.

Sincerely,

JUDY  Digitally signed  
by JUDY BLOOM  
Date: 2021.10.12  
15:53:14 -06'00'

Judy Bloom, Manager  
Clean Water Branch

Enclosure

CC:

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Jerry Big Eagle, Natural Resources Director, Ute Indian Tribe, [jerryb@utetribes.com](mailto:jerryb@utetribes.com)

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U.S. Environmental Protection Agency Region 9

Sahrye Cohen, Wetlands Section Manager, [Cohen.Sahrye@epa.gov](mailto:Cohen.Sahrye@epa.gov)

**U.S. Environmental Protection Agency Region 8 Clean Water Act Section 401  
Water Quality Certification for the U.S. Corps of Engineers CWA Section 404  
2021 Nationwide Permits Reissuance**

This Certification applies to any potential point source discharges from potential projects authorized under the proposed re-issuance of the following U.S. Army Corps of Engineers CWA 404 Nationwide Permit (NWP) into waters of the United States that occur within Indian country<sup>1</sup> lands within the state of Utah: NWP 3, 4, 5, 6, 7, 13, 14, 15, 16, 17, 18, 19, 20, 22, 23, 25, 27, 30, 31, 32, 33, 34, 36, 37, 38, 41, 45, 46, 49, 53, 54, and 59/E.<sup>2</sup>

Section 401(a)(1) of the Clean Water Act requires applicants for Federal permits and licenses that may result in discharges into waters of the United States to obtain certification that potential discharges will comply with applicable provisions of the CWA, including Sections 301, 302, 303, 306 and 307. Where no state agency or tribe has authority to give such certification, the U.S. Environmental Protection Agency (EPA) is the certifying authority. In this case, the Paiute Indian Tribe of Utah, Skull Valley Band of Goshute Indians of Utah, Northwestern Band of the Shoshone Nation, Ute Mountain Ute Tribe, and Ute Indian Tribe currently are not authorized to provide CWA Section 401 certifications for discharges occurring on the reservations, or any other Indian country lands, within the State of Utah, therefore, the EPA is making the certification decisions for discharges that may result from potential projects authorized under the proposed Corps CWA 404 NWPs listed above.<sup>3</sup>

### **General Information**

The general information provided in this section is intended to provide context for EPA's certification decision and does not itself constitute a certification condition(s). The information in this section is being provided to help project proponents comply with the terms and conditions of the CWA Section 401 certification on the NWPs on applicable Indian country lands.

- Prior to work commencing, project proponents should notify the appropriate Tribal Environmental Office.
- The project proponents for projects authorized under the NWPs should obtain all other permits, licenses, and certifications that may be required by federal, state, or tribal authority.

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<sup>1</sup> Indian country is defined in 18 U.S.C. Section 1151. Indian country in Utah generally includes (1) lands within the exterior boundaries of the following Indian reservations located within Utah: the Goshute Reservation, the Navajo Indian Reservation, the reservation lands of the Paiute Indian Tribe of Utah (Cedar Band of Paiutes, Kanosh Band of Paiutes, Koosharem Band of Paiutes, Indian Peaks Band of Paiutes, and Shivwits Band of Paiutes), the Skull Valley Indian Reservation, the Uintah and Ouray Reservation (subject to federal court decisions removing certain lands from Indian country status within the Uintah and Ouray Reservation), and the Washakie Reservation; (2) any land held in trust by the United States for an Indian tribe; and (3) any other areas that are "Indian country" within the meaning of 18 U.S.C. Section 1151.

<sup>2</sup> This Certification does not apply to the following NWPs: 1, 2, 8, 9, 10, 11, 24, 28, and 35. The Corps has not requested certification for these NWPs. If any activity authorized by these listed NWPs may result in a discharge into a water of the United States, the project proponent should contact the Corps or EPA to determine if a CWA Section 401 certification is required. Furthermore, NWPs 12, 21, 29, 39, 40, 42, 43, 44, 48, 50, 51, 52, A/55, B/56, C/57, and D/58 were reissued in January 2021. 86 FR 2744. EPA denied certification for all these NWPs, except NWP 48. Project proponents must apply for an individual CWA Section 401 certification from EPA for all NWPs reissued in January 2021, except NWP 48, for which EPA expressly waived certification authority.

<sup>3</sup> EPA Region 9 implements EPA programs, such as the Clean Water Act section 401 water quality certification program, for the Indian country lands of the Navajo Nation and the Confederated Tribes of the Goshute Reservation, and therefore this certification does not pertain to those Indian country lands.

- If a project is unable to meet the enclosed conditions, or if certification is denied for an applicable NWP, the project proponent should request an individual CWA Section 401 certification from EPA. An individual certification request is subject to the requirements outlined in 40 CFR 121.
- Copies of this certification should be kept on the job site and readily available for reference.
- Pursuant to CWA section 308(a), EPA representatives may inspect the authorized activity and any mitigation areas to determine compliance with the terms and conditions of the NWP.
- If you have questions regarding this certification, or need assistance contacting the appropriate tribe, please contact EPA Region 8 at: [R8CWA401@epa.gov](mailto:R8CWA401@epa.gov) and Aaron Blair at (303) 312-6883 or via email at [blair.aaron@epa.gov](mailto:blair.aaron@epa.gov) or Toney Ott at (303) 312-6906 or via email at [ott.toney@epa.gov](mailto:ott.toney@epa.gov). Additional information on tribes in EPA Region 8 also can be found at: <https://www.epa.gov/tribal/region-8-tribal-program>.

### **NWPs Granted with Conditions (121.7(d)(2))**

On behalf of the tribes listed above, CWA Section 401 certification is granted with the following conditions for NWPs 3, 5, 6, 7, 13, 14, 15, 18, 19, 20, 23, 25, 27, 30, 31, 32, 33, 36, 37, 38, 41, 45, 46, and 59/E. EPA Region 8 has determined that any discharge authorized under these proposed NWPs will comply with water quality requirements, as defined in 40 C.F.R. 121.1(n), subject to the following conditions pursuant to Section 401(d). Note that all correlating justification statements and citations as required by 40 CFR 121.7(d)(2) are included in Appendix A.

**General Condition 1:** Point source discharges shall not occur in jurisdictional waters of these special aquatic resources: (1) fens, bogs, or other peatlands; (2) within 100 feet of the point of discharge of a known natural spring source; (3) riffle-pool complexes of streams; or (4) water sources above hanging gardens. Projects or activities expected to have potential discharges into these areas are not covered by this certification and require a project-specific CWA Section 401 certification from EPA Region 8.

A peatland is defined by the U.S. Forest Service as any type of peat covered terrain with an accumulation of at least 20 to 40 centimeters of peat within the upper 80 centimeters of the soil profile. More resources on peatlands and hanging gardens can be found here:

<https://www.fws.gov/mountain-prairie/es/fen/FWSRegion6FenPolicy1999.pdf>

[https://www.fs.fed.us/wildflowers/beauty/California\\_Fens/what.shtml](https://www.fs.fed.us/wildflowers/beauty/California_Fens/what.shtml)

<https://cnhp.colostate.edu/cnhpblog/2009/08/11/hanging-gardens/>

<https://springstewardshipinstitute.org/hanging-garden>

**General Condition 2:** Except as specified in the project plan, no debris, silt, sand, cement, concrete, oil or petroleum, organic material, or other construction related materials or wastes shall be allowed to enter or be stored within 100 feet of waters of the U.S. If materials are stored within 100 feet of waters of the U.S., the project plan shall identify the measures and controls that will be used to ensure the materials will not enter waters of the U.S. No activities shall result in an unconfined discharge of liquid cement into waters of the U.S.

Any materials not specified in the project plan that do enter waters of the U.S. shall be reported to EPA ([R8CWA401@epa.gov](mailto:R8CWA401@epa.gov)) with a remediation plan within 15 days. Any of these substances that enter a waterbody shall be reported to EPA Region 8, Army Corps, and tribal environmental staff within 24 hours.

For emergency spills, including any spills of petroleum products, contact EPA's National Response Center at 1-800-424-8802, the appropriate Tribal Environmental Office, and local spill response hotlines within 24 hours.

**General Condition 3:** Activities that may result in a point source discharge shall occur during seasonal low flow or no flow periods. Activities that cannot meet this condition require a project-specific CWA Section 401 certification from EPA Region 8.

**General Condition 4:** When operating equipment or otherwise undertaking construction activities (including grouting riprap) in aquatic resources:

- Work shall be completed in the dry, unless justification for working in the wet can be documented by the project proponent prior to construction.<sup>4</sup>
- Concrete grouting shall be allowed to dry thoroughly before exposure to waters of the U.S.
- All equipment shall be cleaned prior to arriving on the project site. All equipment shall be inspected daily and prior to entering any streams or wetlands for oil, gas, diesel, anti-freeze, hydraulic fluid, and other petroleum leaks.
- All contaminated areas shall be cleaned immediately, and contaminated soil removed from the site or contained in enclosed containers. Containers shall not be stored within 100 feet of waters of the U.S. If site conditions do not allow for storage at least 100 feet away from waters of the U.S., or if the topography is such that storage can occur within 100 feet without risk to waters of the U.S., the project proponent shall document this along with the measures and controls that will be used to ensure contaminants will not enter waters of the U.S. All equipment detected with leaks shall be repaired promptly or moved offsite within 24 hours.
- Containment booms and/or absorbent material shall be available onsite. In the case of spills, containment booms and/or absorbent materials shall be employed immediately to prevent discharges from reaching waters of the U.S.

**General Condition 5:** For projects that require coverage under EPA's Construction General Permit, the project proponent shall submit the Stormwater Pollution Prevention Plan (SWPPP) to EPA Region 8 (R8CWA401@epa.gov).

For projects that do not require the development of a SWPPP, the project proponent shall document how the project will utilize construction techniques, including soil erosion and sediment controls, to prevent or minimize water quality degradation because of the project. Projects shall not permanently impact the overall health of the aquatic resource; beneficial uses shall not be lost or impaired.

**General Condition 6:** Vegetation in jurisdictional wetlands and waterbodies shall be protected except where its removal is necessary for completion of the work. Locations disturbed by construction activities shall be revegetated with appropriate native vegetation in a manner that optimizes plant establishment for the specific site (e.g., stockpiling of existing topsoil that is weed-seed free). Revegetation may include topsoil replacement, planting, seeding, fertilization, liming, and weed-free mulching. All revegetation materials, including plants and plant seed shall be on site or scheduled for delivery prior to or upon completion of the earth moving activities. Exceptions to native revegetation include agricultural lands that are being returned to crop or pasture vegetation, with Corps permission.

Where removal of vegetation occurs, the project proponent shall develop a restoration plan prior to initiating construction on the project. The restoration plan shall include measures, including but not limited to:

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<sup>4</sup> See "Working in the dry: Cofferdams, in-river construction, and the United States Army Corps of Engineers" <https://usace.contentdm.oclc.org/digital/collection/p16021coll4/id/156/>

- The project proponent shall describe and photo document where the disturbance or removal of riparian/wetland vegetation will occur during the completion of the work.
- The project proponent shall revegetate disturbed jurisdictional areas within three months of completion of construction, based on pre-disturbance or reference site conditions, including percent cover and native species diversity.
- The project proponent shall revegetate any disturbed wetland soil with native plant species. Non-native and invasive species shall not be used for restoration activities.

**General Condition 7:** The placement of material (discharge) for the construction of new dams is not certified, except for stream restoration projects. Activities that cannot meet this condition require a project-specific CWA Section 401 certification from EPA Region 8.

**General Condition 8 – Applicable only to the following NWP:** 3, 7, 13, 14, 15, 19, 23, 27, 37, and 59/E.

Project proponents shall provide notice to EPA Region 8 at least 30 days prior to commencing work in water of the U.S. to provide EPA Region 8 with the opportunity to review and inspect the activity for the purposes of determining whether any discharge from the proposed project will violate this water quality certification. In cases where the Corps requires a PCN for the applicable NWP, in accordance with Corps' National General Condition 32(b), Pre-Construction Notification (86 FR 2873), the applicant shall also provide the PCN to Region 8.

Additionally, the applicant shall include a summary of communications with the affected Tribe's water quality staff regarding the project, including any concerns or issues, in its submission to EPA.

**NWP-Specific Conditions:**

**NWP 3, Specific Condition 1:** No more than 25 cubic yards of new or additional riprap shall be placed to protect the structure or fill. If a project proponent seeking NWP authorization plans to use more than 25 cubic yards of new or additional riprap to protect the structure or fill, the project proponent shall request a project-specific CWA Section 401 certification from EPA Region 8.

**NWP 3, Specific Condition 2:** Bridge replacements shall span the bankfull width and/or the ordinary highwater mark of the affected waters of the U.S. Projects or activities that cannot meet this condition require a project-specific CWA Section 401 certification from EPA Region 8.

**NWP 3, Specific Condition 3:** Fill or dredged material shall not result in an increase in land contour height beyond the original dimensions for the repair of low water crossings, or loss of stream cross section dimensions. Original land contour dimensions shall be documented prior to construction to confirm contours are returned to these dimensions post-maintenance activities.

**NWP 3, Specific Condition 4:** Silt and sediment removal shall not exceed:

- 1) 50 linear feet for low water crossings; and
- 2) 100 linear feet for bridge crossings.

Projects or activities that cannot meet this condition require a project-specific CWA Section 401 certification from EPA Region 8.

**NWP 7, Specific Condition 1:** Construction of the outfall structure shall be placed at the streambed elevation and, at a minimum, the pipe should be sized to prevent high pressure discharge of stormwater. Pipe sizing

selection methods and justification that high pressure discharge will be minimized shall be documented by the project proponent.

**NWP 7, Specific Condition 2:** Outfall structures shall not be constructed in jurisdictional wetlands. If a project proponent plans to construct an outfall structure in a jurisdictional wetland, the project proponent shall request a project-specific CWA Section 401 certification from EPA Region 8.

**NWP 7, Specific Condition 3:** For activities that do not require a SWPPP, the project proponent shall submit to EPA, an erosion and sediment control plan prior to construction that includes outfall stabilization controls. (Projects or activities requiring a SWPPP must submit the SWPPP to EPA per General Condition 5.)

The plan shall describe type, location, and maintenance schedules for all controls to be put in place prior to, during, and after construction to stabilize all areas of the bed and bank around and adjacent to the outfall structure and associated intake structures that may be affected by outfall or stream flows, respectively. The plan shall provide for maintenance of measures, and adaptive management processes if any measures are determined to be ineffective. During monitoring and maintenance, if water quality requirements are exceeded or if measures are identified as ineffective, then descriptions of additional measures taken to ensure compliance shall be sent to EPA within 48 hours of the exceedance or measure failure.

Rip rap aprons and/or energy dissipation structures shall be constructed to provide protection from the erosive potential of high-velocity flows, as documented in the erosion and sediment control plan, with adaptive management in place for potential structure failures.

**NWP 7, Specific Condition 4:** The project proponent shall submit a monitoring plan to EPA Region 8 prior to initiating construction on the project.

- The project proponent shall monitor the project site through the next growing season or until the site is restored to pre-disturbance or reference site conditions. The monitoring plan shall contain the restoration plan (as outlined in General Condition 6) and any additional adaptive management methods if the site is not achieving pre-disturbance or reference site conditions.
- The project proponent shall use referenced photographs to document the status of all relevant locations at the project site prior to construction, during project construction, after project completion, and upon completion of all restoration activities, consistent with the monitoring plan.
- The project proponent shall submit electronic photos (prior to, during and post-construction, and post-restoration) in an annual monitoring report to EPA Region 8 ([R8CWA401@epa.gov](mailto:R8CWA401@epa.gov)). The report shall be labeled with the project name and Corps District number.

**NWP 13, Specific Condition 1:** The project proponent shall submit a project plan with design techniques and stabilization methods to EPA Region 8 prior to construction. Activities shall use native vegetation or other bioengineered design techniques (e.g., willow plantings, root wads, large woody debris, etc.) or a combination of hard-armoring (e.g., rock) and predominately native vegetation or bioengineered design techniques. Artificial soil stabilizing material (e.g., mulch, matting, netting, etc.) shall be used to reduce soil erosion. These materials, to include all plants and plant seed, shall be on site or scheduled for delivery prior to or upon completion of the earth moving activities. Sediment control measures shall be maintained in good working order at all times.

Any project proposing bank stabilization solely using hard armoring methods, or where the scope of the entire project is greater than 500 linear feet, is not authorized under this certification and the project proponent shall seek a project-specific CWA Section 401 certification from EPA Region 8.

**NWP 13, Specific Condition 2:** The slopes of disturbed banks shall be configured to mimic a stable reference reach and not reduce the bottom width of the stream. Pre-construction cross sections shall be included in the project plan submitted to EPA Region 8.

**NWP 13, Specific Condition 3:** The project proponent shall submit a monitoring plan to EPA Region 8 prior to initiating construction on the project.

- The project proponent shall monitor the project site through the next growing season or until the site is restored to pre-disturbance or reference site conditions. The monitoring plan shall contain the restoration plan (as outlined in General Condition 6) and any additional adaptive management methods if the site is not achieving pre-disturbance or reference site conditions.
- The project proponent shall use referenced photographs to document the status of all relevant locations at the project site prior to construction, during project construction, after project completion, and upon completion of all restoration activities, consistent with the monitoring plan.
- The project proponent shall submit electronic photos (prior to, during and post-construction, and post-restoration) in an annual monitoring report to EPA Region 8 ([R8CWA401@epa.gov](mailto:R8CWA401@epa.gov)). The report shall be labeled with the project name and Corps District number (if available).

**NWP 14, Specific Condition 1:** NWP 14 is conditionally certified, except that a project-specific CWA section 401 certification is required for projects authorized under one or more NWP by the Corps that result(s) in:

1. Greater than 1/10 acre of impacts to waters of the U.S.; or
2. Greater than 300 linear feet of impacts to waters of the U.S.

**NWP 14, Specific Condition 2:** The project proponent shall submit a project design plan to EPA Region prior to construction. Affected streambanks shall be sloped such that the stream bottom width is not reduced, and bottom elevations are restored to original elevations. Stream bank slopes should not be steeper than 3:1. Justification for banks steeper than 3:1 shall be included in the project design plan. The project design plan also shall document how all temporary fills and structures will be removed, and the area restored to pre-project conditions.

**NWP 14, Specific Condition 3:** Permanent culverts shall be installed using an established culvert analysis and design tool (ex. HY-8, HEC-RAS, USGS CAP, etc.). Culverts shall span the bankfull width and/or ordinary high-water mark of the affected waterbody. The culvert bottom shall be installed below the existing streambed elevation to allow aquatic organism passage and the natural substrate to reestablish.

**NWP 14, Specific Condition 4:** The project proponent shall submit a monitoring plan to EPA Region 8 prior to initiating construction on the project.

- The project proponent shall monitor the project site through the next growing season or until the site is restored to pre-disturbance or reference site conditions. The monitoring plan shall contain the restoration plan (as outlined in General Condition 6) and any additional adaptive management methods if the site is not achieving pre-disturbance or reference site conditions.
- Impacts to aquatic resource buffers shall be avoided. If avoidance is not possible, methods for buffer restoration and monitoring shall be in the monitoring plan.
- The project proponent shall use referenced photographs to document the status of all relevant locations at the project site prior to construction, during project construction, after project completion, and upon completion of all restoration activities, consistent with the monitoring plan.



- The project proponent shall submit electronic photos (prior to, during and post-construction, and post-restoration) in an annual monitoring report to EPA Region 8 ([R8CWA401@epa.gov](mailto:R8CWA401@epa.gov)). The report shall be labeled with the project name and Corps District number (if available).

**NWP 15, Specific Condition 1:** Fill or dredged material shall not result in an increase in land contour height beyond the original dimensions of the waterbody. Original land contour dimensions shall be documented prior to construction to confirm contours are restored to pre-disturbance conditions. Affected streambanks shall be sloped such that the stream bottom width is not reduced, and bottom elevations are restored to original elevations. Stream bank slopes should not be steeper than 3:1. Justification for banks steeper than 3:1 shall be included in the project design plan. The project design plan also shall document how all temporary fills and structures will be removed, and the area restored to pre-project conditions.

**NWP 15, Specific Condition 2:** Crossings shall be placed perpendicular to the water course, unless the project proponent can document that this would result in increased impacts to aquatic resources or compromise the safety of the structure.

**NWP 15, Specific Condition 3:** Bridge decks shall be designed such that they do not drain directly into the waterbody.

**NWP 15, Specific Condition 4:** Bridges shall span the bankfull width, adjacent wetlands, and/or ordinary high-water mark of the affected waterbody. Projects that cannot meet this condition require a project-specific CWA Section 401 certification from EPA Region 8.

**NWP 19, Specific Condition 1:** Dredged or fill materials shall be placed in non-jurisdictional areas and controlled such that it cannot return to waters of the U.S. Dredged or fill material shall not be placed on islet, islands, sandbars, landmass or other area of sediment accumulation within the banks of a stream, shore of lake, edge of wetland or other type of waterbody, unless the project proponent can document that the vegetation and geomorphology signify a long-term stable configuration (e.g., areas of sediment accumulation are not formed from temporary situations such as drought conditions or upstream reservoir release conditions).

**NWP 27, Specific Condition 1:** NWP 27 is conditionally certified, subject to the general conditions listed above, except for the following activities, where an individual project-specific CWA Section 401 certification is required: (1) the project involves dam removal; and/or (2) the project or activities involve greater than 1-acre of impacts to waters of the U.S.; and/or (3) the project impacts greater than 500 linear feet of waters of the U.S.

**NWP 37, Specific Condition 1:** Original and planned stream contours shall be documented by the project proponent. Construction activities shall not result in the channelization of streams or sloughs. Channelization is defined, for this purpose, as the placement of excess material in a manner that modifies the bank alignment, and subsequently the channel alignment, from its present condition.

**NWP 37, Specific Condition 2:** Construction activities shall not remove silt beyond what was deposited by the emergency event. Based on the original site conditions and planned project design, the project proponent shall justify the amount of silt identified for removal, such that the construction activities do not result in the removal of silt beyond what was deposited by the emergency event (e.g., excavating a wetland area to the point it's a stormwater retention pond, or deepening/widening a stream channel to accommodate higher flow capacity).

**NWP 37, Specific Condition 3:** Construction of temporary structures or drains for the purpose of reducing or preventing flood damage shall be removed within 60 days following the emergency event, unless justification for retaining the structures for a longer period is documented by the project proponent.

### **NWPs Denied (121.7(e)(2))**

On behalf of the Paiute Indian Tribe of Utah, Skull Valley Band of Goshute Indians of Utah, Northwestern Band of the Shoshone Nation, Ute Mountain Ute Tribe, and Ute Indian Tribe, EPA Region 8 cannot certify that the range of discharges from potential projects authorized under the following proposed NWPs will comply with water quality requirements, as defined in 40 CFR 121.1(n). Therefore, CWA Section 401 water quality certification is denied for NWPs 16, 17, 34, 49, and 53 and applicants must request an individual water quality certification, consistent with 40 CFR 121.5.

Certification denial is due to insufficient information. 40 CFR 121.7(e)(2)(iii). In EPA's unique role certifying on behalf of a tribe, in a tribal jurisdiction where EPA is not the regulator, EPA lacks important information about tribal water resources. In the case of the Paiute Indian Tribe of Utah, Skull Valley Band of Goshute Indians of Utah, Northwestern Band of the Shoshone Nation, Ute Mountain Ute Tribe, and Ute Indian Tribe, EPA Region 8 lacks sufficient information on sensitive resources that may exist on these tribal lands, potential impaired waters on these tribal lands, and potential cultural importance of the water resources on these tribal lands. Additional information on these specific subjects would be needed for EPA Region 8 to assure that the range of discharges from potential projects authorized under NWPs 16, 17, 34, 49, and 53 will comply with water quality requirements, as defined in 40 CFR 121.1(n).

This information would also be necessary for EPA Region 8 to identify specific water quality requirements and evaluate whether the range of discharges from potential projects will comply with such requirements, in accordance with CWA section 401(a)(1) and 40 CFR 121.7(b). Lacking this information, EPA Region 8 is therefore denying certification.

### **NWPs Waived (121.9(a)(1))**

On behalf the Paiute Indian Tribe of Utah, Skull Valley Band of Goshute Indians of Utah, Northwestern Band of the Shoshone Nation, Ute Mountain Ute Tribe, and Ute Indian Tribe, EPA Region 8 is expressly waiving its authority to act on the CWA § 401 certification request for the following proposed NWPs: 4, 22, and 54.

## Appendix A

### Condition Justification Statements and Citations as Required by 40 CFR 121.7(d)(2)

Condition	Justification Statement	Citation
<b>General Condition 1</b>	This condition is necessary to ensure activities that may result in point source discharges into waters of the U.S. do not degrade these unique and difficult to replace aquatic resource types, which play an important role in maintaining water quality and hydrologic function in mountain and prairie ecoregions. This condition is consistent with Regional Conditions implemented by the Corps in Region 8 states.	40 CFR 230.10(c); 40 CFR 230 Subpart E
<b>General Condition 2</b>	This condition is necessary to ensure water quality is not degraded by toxic pollutants in toxic amounts, raw materials, oil, grease, gasoline, or other types of fluids used to operate and maintain equipment used to complete the project. Requiring materials to be stored at least 100 feet away from waters of the U.S. reduces the risk that such materials would be mobilized by rainfall or runoff and enter waters of the U.S.	40 CFR 230.10(b); 40 CFR 230.10(d); 40 CFR 230.71
<b>General Condition 3</b>	This condition is necessary because it minimizes turbidity and sediment caused by construction activities, minimizes equipment contact with water (and potential for oil, gas, invasive species, etc. contamination), and allows for clean-up of potential spills before entering waters. It is necessary to ensure that water quality is not degraded, and biology of the waters are not negatively impacted by the project.	40 CFR 230.10(c); 40 CFR 230.10(d); 40 CFR 230.23; 40 CFR 230.24; 40 CFR 230.72(d)
<b>General Condition 4</b>	This condition is necessary to ensure water quality is not degraded by oil, grease, gasoline, or other types of fluids used to operate and maintain equipment used to complete the project and provides for clean-up of potential contaminants before entering waters. Requiring materials to be stored at least 100 feet away from waters of the U.S. reduces the risk that such materials would be mobilized by rainfall or runoff and enter waters of the U.S. This condition helps protect the native biology of the impacted waters by preventing the spread of invasive or nuisance species.	40 CFR 230.10(d); 40 CFR 230.74
<b>General Condition 5</b>	<p>This condition ensures that the project proponent is aware of and complies with CWA Section 402 construction stormwater management requirements. Compliance assistance tools, such as SWPPP guidance and a template can be found at: <a href="https://www.epa.gov/npdes/swpppguide">https://www.epa.gov/npdes/swpppguide</a>.</p> <p>Activities authorized under NWP's that do not require a SWPPP also can also cause turbidity (e.g., total suspended and settleable solids) that can impair water quality. This condition is necessary because it minimizes turbidity and sedimentation caused by construction activities. It is necessary to ensure that water quality is not degraded, and biology of the waters are not negatively impacted by the project. This condition is also necessary to</p>	40 CFR 230.10(d); 40 CFR 230.72

Condition	Justification Statement	Citation
	provide clarity on how to meet “appropriate soil erosion and sediment controls, as required by NWP General Condition 12. Use of other “appropriate” measures is not prohibited, but the inclusion of this condition ensures that water quality impacts of dredged or fill material are minimized.	
<b>General Condition 6</b>	This condition is necessary to provide the project proponent with clarity on what meets the requirement for appropriate revegetation as required by NWP General Condition 13. Revegetation maintains and improves water quality because riparian vegetation acts as a buffer to reduce the amount of sediment and pollutants that enter waterways. Riparian vegetation also benefits aquatic life by providing shade that keeps instream water temperatures cool and providing refugia and food sources). Native vegetation, because it is adapted to local conditions (e.g., soil types and temperature) provided this function most efficiently. Native vegetation also protects the biology of waters by providing habitat for semi-aquatic organisms and other organisms that are a food source to aquatic life.	40 CFR 230.10(d); 40 CFR 230.75
<b>General Condition 7</b>	This condition is necessary to ensure impacts to water quality as a result of flow alterations are minimized to the maximum extent practicable, as required by NWP General Condition 8. Requiring a project-specific certification for new dams will provide for consideration of site-specific water quality conditions and local tribal regulatory requirements.	40 CFR 230.10(c); 40 CFR 230.10(d); 40 CFR 230.23; 40 CFR 230.24
<b>General Condition 8 Applies to NWPs 3, 7, 13, 14, 15, 19, 23, 27, 37, and 59/E</b>	This condition is necessary to provide EPA Region 8 with notice and information to allow for an efficient and effective pre-operation inspection to determine if the certified discharge will violate the certification. If the project scope changes during the Corps review prior to initiation of the activity, it is also critical for EPA Region 8 to be provided any changes in the project design, scope, amount and location of discharges to inform the pre-operation inspection opportunity as provided by 40 CFR 121.11(a).	40 CFR 121.11(a)
<b>NWP 3, Specific Condition 1</b>	The effects of a discharge can be minimized by the manner in which it is dispersed, such as setting limitations on the amount of material to be discharged. The placement of new or additional riprap without limiting the amount of impacts authorized could result in more than minimal adverse effects on water quality. Limiting the placement of additional riprap to no more than 25 cubic yards will help ensure that the placement provides localized erosion control without causing undesirable consequences to water quality and degradation of physical habitat. This limit is consistent with limits imposed by current and/or past Corps NWPs authorizing similar activities.	40 CFR 230.10(d); 40 CFR 230.70; 40 CFR 230.73; 40 CFR 230.75
<b>NWP 3, Specific Condition 2</b>	Minimization of adverse effects on populations of plants and animals can be achieved by avoiding changes in water current and circulation patterns. In addition, the effects of the discharge can be minimized by locating and confining the discharge to minimize smothering of organisms and designing the discharge to avoid a disruption of periodic water inundation patterns. The placement of a bridge or structure within bankfull width and/or the ordinary high water mark of a water of the U.S. would alter the hydrologic	40 CFR 230.10(d); 40 CFR 230.70; 40 CFR 230.73; 40 CFR 230.75

Condition	Justification Statement	Citation
	<p>characteristics of the waterbody, which could lead to increased erosional forces, scour around the structure during bankfull flows, high sediment loads entering the waterbody, abandonment of the primary channel, and undermining of the structure itself.</p> <p>This condition would also support Nationwide Permit General Conditions 2 (Aquatic Life Movements) and 9 (Management of Water Flows).</p>	
<b>NWP 3, Specific Condition 3</b>	Minimization of adverse effects on populations of plants and animals can be achieved by avoiding the destruction of remnant natural sites within areas already affected by development and avoiding changes in water current and circulation patterns. Minimization can also be achieved by using planning and construction practices to institute habitat development and restoration to produce a new or modified environmental state of higher ecological value by displacement of some or all of the existing environmental characteristics. The discharge of dredged or fill material which alters the contours of a waterbody and/or its riparian zone can result in the loss or change of breeding and nesting areas, escape cover, travel corridors, and preferred food sources for resident and transient wildlife species associated with the aquatic ecosystem.	40 CFR 230.10(d); 40 CFR 230.70; 40 CFR 230.73; 40 CFR 230.75
<b>NWP 3, Specific Condition 4</b>	Without a linear foot limit associated with silt and sediment removal in waters of the U.S., excess removal can result in varying degrees of change in the complex physical, chemical, and biological characteristics. Excess silt and sediment removal may alter the direction or velocity of water flow or otherwise change the dimensions of a water body which can result in adverse changes to structure and dynamics of aquatic communities, erosion rates, and increases in suspended particulates.	40 CFR 230.10(d); 40 CFR 230.70; 40 CFR 230.73; 40 CFR 230.75
<b>NWP 7, Specific Condition 1</b>	By specifying conditions on outfall sizing, placement, and stabilization, these measures will help ensure that outfall structures are constructed such that they provide localized erosion control at the point(s) of discharge while minimizing habitat degradation and undesirable downstream impacts.	40 CFR 230.10(d); 40 CFR 230.70; 40 CFR 230.73
<b>NWP 7, Specific Condition 2</b>	Water quality certification on a project-by-project basis for projects planning to construct outfall structures in jurisdictional wetlands is necessary so the certifying authority can evaluate site-specific water quality characteristics to determine if the project will comply with water quality requirements, including tribal regulatory requirements. Details about the location and project-specific actions to be taken to minimize the adverse effects of the discharge would be evaluated in an individual project water quality certification review.	40 CFR 230.10(d); 40 CFR 230.70; 40 CFR 230.73
<b>NWP 7, Specific Condition 3</b>	Erosion from outfall structures can be caused by several factors, such as uncontrolled stormwater runoff, inadequate energy dissipation structures, nick point migration, poor slope stabilization, or extreme storm events that exceed design capacities. Without stabilization controls in place, construction of outfall structures can lead to changes in erosion and deposition rates, increases in suspended particulates in the waterbody, and undermining of the outfall structure itself.	40 CFR 230.10(d); 40 CFR 230.70; 40 CFR 230.73

Condition	Justification Statement	Citation
<b>NWP 7, Specific Condition 4</b>	This condition is necessary because documenting the project will make it possible to determine that water quality is maintained, or protected better than, the existing conditions; given that the selection of the discharge location and the actions taken to control the materials after discharge can help minimize the adverse effects of the discharge. This condition is necessary to protect water quality because it ensures that the project proponent is using planning and construction practices that will maintain the integrity of the site hydrology and maintain the aquatic resource functions and values. Monitoring for at least one growing season, or until replanted areas meet pre-disturbance or reference site conditions, will provide an adequate indication that the sediment and erosion control plan efforts are successful. This condition is necessary to sustain aquatic resource functions and value characteristics, measure the progress of riparian revegetation, and ensure planned measures are effective.	40 CFR 230.10(d); 40 CFR 230.70; 40 CFR 230.72
<b>NWP 13, Specific Condition 1</b>	While effective at preventing localized erosion, hard armoring used as streambank stabilization can have a number of negative downstream effects such as increasing flow velocities, impeding hydrologic interaction with the floodplain, and degrading physical habitat. Specifying the methods and techniques which can be used under NWP 13 will help prevent habitat degradation and minimize negative downstream impacts while also achieving localized streambank stabilization and erosion control.	40 CFR 230.10(d); 40 CFR 230.72
<b>NWP 13, Specific Condition 2</b>	This condition is necessary to ensure that bank stabilization is effective at preventing localized erosion without promoting adverse downstream effects such as increasing flow velocities, impeding hydrologic interaction with the floodplain, and degrading physical habitat. Establishing design criteria based on a stable channel reference reach can help ensure successful stabilization, prevent habitat degradation, and minimize negative downstream impacts while also achieving localized streambank stabilization and erosion control.	40 CFR 230.10(d); 40 CFR 230.72
<b>NWP 13, Specific Condition 3</b>	This condition is necessary because documenting the project will make it possible to determine that water quality is maintained, or protected better than, the existing conditions; given that the selection of the discharge location and the actions taken to control the materials after discharge can help minimize the adverse effects of the discharge. This condition is necessary to protect water quality because it ensures that the project proponent is using planning and construction practices that will maintain the integrity of the site hydrology and maintain the aquatic resource functions and values. Monitoring for at least one growing season, or until replanted areas meet pre-disturbance or reference site conditions, will provide an adequate indication that the restoration plan efforts are successful. This condition is necessary to sustain aquatic resource functions and value characteristics, measure the progress of riparian revegetation, and ensure planned measures are effective.	40 CFR 230.10(d); 40 CFR 230.70; 40 CFR 230.72
<b>NWP 14, Specific Condition 1</b>	The proposed NWP 14 would allow up to ½ acre of impacts for each linear transportation crossing. This means that multiple crossings for the same project could be authorized for ½ acre impacts each for an unlimited	40 CFR 230.10(d); 40

Condition	Justification Statement	Citation
	<p>number of crossings. Without a 1/10 acre and 300 linear feet restriction on all crossings in total for a specific project, linear transportation projects could result in more than minimal adverse environmental effects and degrade water quality. Activities authorized by NWP's and other general permits must be similar in nature, cause only minimal adverse environmental effects when performed separately, and have only minimal adverse effect on the environment. Without the 300 linear feet restriction, authorized activities to streams, many of which are already stressed or impaired, would be more than minimal, or could even result in significant impacts to water quality. The 1/10 acre and 300 linear feet limits help ensure that these NWP's are protective of water quality and will result in no more than minimal individual and cumulative adverse environmental effects as required by the CWA. These thresholds for the individual project-specific CWA Section 401 certifications are based on EPA's best professional judgement as well as past practice and consistency with Corps NWP General Condition 23 that requires compensatory mitigation for 1/10 acre or greater impact as well as former Corps conditions limiting impacts to 300 linear feet. The condition is necessary to allow for individual review of activities that could result in more than minimal adverse impacts.</p>	CFR 230.72; 40 CFR 122.26
<b>NWP 14, Specific Condition 2</b>	<p>Maintaining natural stream bottom widths and elevations limits increases in streamflow velocity and reduces the potential for streambed scouring and bank incising. Limiting bank slope steepness reduces the potential for erosion, undercutting and slumping, which add sediment to streams. These controls will ensure that physical habitat and hydrologic characteristics of waters are not degraded, will maintain the habitat and biology of the waters and will ensure the hydrogeomorphology is not negatively impacted by the project.</p>	40 CFR 230.10(d); 40 CFR 230.72; 40 CFR 122.26
<b>NWP 14, Specific Condition 3</b>	<p>This condition is necessary to ensure that discharges associated with culvert placement minimally affect water current patterns and circulation, maintain water flow direction and velocity, do not obstruct flow or change the dimensions of a waterbody. This condition also will minimize adverse effects to the reproductive and feeding movements of some species of fish and crustacea.</p>	40 CFR 230.3; 40 CFR 230.10(d); 40 CFR 230.74; 40 CFR 230.75
<b>NWP 14, Specific Condition 4</b>	<p>This condition is necessary because documenting the project will make it possible to determine that water quality is maintained, or protected better than, the existing conditions; given that the selection of the discharge location and the actions taken to control the materials after discharge can help minimize the adverse effects of the discharge. This condition is necessary to protect water quality because it ensures that the project proponent is using planning and construction practices that will maintain the integrity of the site hydrology and maintain the aquatic resource functions and values. Monitoring for at least one growing season, or until replanted areas meet pre-disturbance or reference site conditions, will provide an adequate indication that the sediment and erosion control plan efforts are successful. This condition is necessary to sustain aquatic resource</p>	40 CFR 230.10(d); 40 CFR 230.70; 40 CFR 230.73; 40 CFR 230.75



Condition	Justification Statement	Citation
	functions and value characteristics, measure the progress of riparian revegetation, and ensure planned measures are effective.	
<b>NWP 15, Specific Condition 1</b>	Maintaining natural stream bottom widths and elevations limits increases in streamflow velocity and reduces the potential for streambed scouring and bank incising. Limiting bank slope steepness reduces the potential for erosion, undercutting and slumping, which add sediment to streams. These controls will ensure that physical habitat and hydrologic characteristics of waters are not degraded, will maintain the habitat and biology of the waters and will ensure the hydrogeomorphology is not negatively impacted by the project.	40 CFR 230.10(d); 40 CFR 230.72; 40 CFR 122.26
<b>NWP 15, Specific Condition 2</b>	Perpendicular stream crossings minimize the length of stream bed and bank impacts for a project. This condition will ensure that physical habitat and hydrologic characteristics of waters are not degraded, will maintain the habitat and biology of the waters and will ensure the hydrogeomorphology is not negatively impacted by the project.	40 CFR 230.10(d); 40 CFR 230.72; 40 CFR 122.26
<b>NWP 15, Specific Condition 3</b>	This condition is necessary because drainage directly from the bridge decks may cause erosion, and introduce additional pollutants, such as oil, gas, sediment, and toxics. Directing bridge deck drainage into constructed runoff water quality control systems will help prevent erosion and keep pollutants from directly entering the waterway.	40 CFR 230.10(d); 40 CFR 230.72; 40 CFR 122.26
<b>NWP 15, Specific Condition 4</b>	The placement of a bridge structures within bankfull width, adjacent wetlands, and/or ordinary high water mark of the affected waterbody would alter the hydrologic characteristics of the waterbody, which could lead to increased erosional forces, scour around the structure during bankfull flows, high sediment loads entering the waterbody, abandonment of the primary channel, and undermining of the structure itself. Requiring an individual CWA Section 401 certification for projects that cannot meet this condition will allow EPA Region 8 to ensure the project does not adversely impact water quality.	40 CFR 230.10(d); 40 CFR 230.72; 40 CFR 122.26
<b>NWP 19, Specific Condition 1</b>	This condition is necessary because it minimizes turbidity and sedimentation caused by dredging and help to ensure the hydrologic and hydrogeomorphic characteristics of the affected waterbody are not degraded.	40 CFR 230.10(d); 40 CFR 230.70
<b>NWP 27, Specific Condition 1</b>	The condition and associated limits are necessary to provide site specific review of those actions and activities that exceed these thresholds to ensure the project meets the requirements for net-increase in aquatic resource functions, and during construction meets all applicable and relevant water quality requirements. For example, for release of accumulated sediments behind a dam, or dam removal projects, EPA Region 8 would need to ensure that sediments do not contain contaminants and/or meet appropriate sediment management requirements. Additionally, EPA Region 8 would need to review the project to determine if there were additional individual CWA Section 401 conditions necessary to meet other water quality requirements, such as instream work-timing restrictions or measures to ensure that water quality discharge parameters are met for erosion control.	40 CFR 230.10(d); 40 CFR 230.21; 40 CFR 230.71 40 CFR 230.72



Condition	Justification Statement	Citation
<b>NWP 37, Specific Condition 1</b>	This condition is necessary because the discharge of dredged or fill material that alters the contours of a waterbody and/or its riparian zone can lead to increased erosion and sediment loads to the waterbody and the loss or change of habitat and preferred food sources for wildlife species associated with the aquatic ecosystem.	40 CFR 230.10(d); 40 CFR 230.73 40 CFR 230.75
<b>NWP 37, Specific Condition 2</b>	This condition is necessary because excess silt and sediment removal may alter the direction or velocity of water flow or otherwise change the dimensions of a water body which can result in adverse changes to structure and dynamics of aquatic communities, erosion rates, and increases in suspended particulates.	40 CFR 230.10(d); 40 CFR 230.73 40 CFR 230.75
<b>NWP 37, Specific Condition 3</b>	This condition is necessary to ensure that the natural physical habitat and hydrologic characteristics of the waterbody are not negatively impacted by the project over the long term.	40 CFR 230.10(c)-(d)



# Ute Mountain Ute Tribe

Environmental Programs Department

P.O. Box 448

Towaoc, Colorado 81334-0448

(970) 564-5430

December 14, 2020

Kelly Allen  
Albuquerque District  
Regulatory Division  
505-342-3216  
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**DATE: 12/11/2020**

**SENT VIA EMAIL  
DIGITAL READ RECEIPT REQUESTED**

**Re: Certification of the proposed U.S. Army Corps of Engineers 2020 Nationwide Permits pursuant to Section 401 of the Clean Water Act for lands of the Ute Mountain Ute Tribe in Colorado, New Mexico and Utah in the Albuquerque, Sacramento and Omaha Districts.**

The Ute Mountain Ute Tribe (UMUT) has responsibility under Section 401 of the Clean Water Act (CWA) to evaluate and certify water quality protection for federal permits or licenses issued for work on lands within the boundary of the Ute Mountain Ute Reservation.

This certification is in response to the US Army Corps of Engineers Notice of Issuance of Proposed Nationwide Permits (NWP) listed in the September 15, 2020 Federal Register for Clean Water Act (CWA) Section 401 water quality certification and the CWA 401 certification request from the U.S. Army Corps of Engineers Albuquerque District on October 15, 2020.

This certification applies to any potential point source discharges from potential projects authorized under the proposed U.S. Corps of Engineers Nationwide Permit Reissuance (Federal Register September 15, 2020) into waters of the United States that occur within the Ute Mountain Ute Reservation. It is the responsibility of the applicant to determine the proper CWA Section 401 authority through coordination and recommendations of status through the UMUT or certification of land status by the Bureau of Indian Affairs (BIA).

Section 401(a)(1) of the Clean Water Act requires applicants for Federal permits and licenses that may result in discharges into waters of the United States to obtain certification that potential discharges will comply with applicable provisions of the CWA including Sections 301, 302, 303, 306 and 307.

These requirements will protect water quality and help ensure that the NWP program minimizes adverse impacts on the aquatic environment on tribal lands, both individually and cumulatively, as required by CWA Section 404(e).

Project applicants will need to request an individual certification from UMUT for NWP that are denied. If a project is unable to meet the enclosed conditions, or if certification is denied for an applicable NWP, the applicant may request an individual certification from UMUT. An individual certification request must follow the requirements outlined in §121.5 of EPA's CWA § 401 Certification Rule, effective September 11, 2020.



Projects failing to meet the enclosed conditions, despite qualifying for use of a NWP are not eligible for coverage under this programmatic certification and must contact UMUT for individual project certification. Projects qualifying for use of a NWP and meeting the enclosed conditions must notify UMUT pursuant to General Condition #1, but may proceed after verifying that notification has been received and without further written verification from UMUT.

#### General Information

The general information provided in this cover letter section does not constitute a certification condition(s). The Applicant is responsible for obtaining all other permits, licenses, and certifications that may be required by federal, state or tribal authorities where applicable, including an EPA general construction CWA Section 402 stormwater permit notice of intent. This certification must be retained in your files with the applicable NWPs as documentation of UMUT certification for the above-referenced proposed NWPs. This certification is specifically associated with the proposed NWPs and expires when these NWPs expire.

UMUT has not received the final nationwide permits, national or regional conditions from the Corps. Therefore, if nationwide permits, national conditions and/or regional conditions are modified significantly, UMUT expects notifications of these modifications and that the Corps of Engineers will follow the spirit of 40 CFR Part 121 and request new or revised 401 certifications to reflect the significant changes in the permits.

The Corps and applicants should consider contacting UMUT Environmental Programs Department as early as possible for potential permits and actions that may be complicated and when early discussions may be beneficial to all parties. UMUT requests notification when the Corps District Engineer intends to exert discretionary authority or waive the acreage, linear feet or cubic yard limits of any of the 2020 proposed Nationwide Permits. We would like the opportunity to discuss the rationale and finding of DeMinimus impact in these instances. The Corps should be aware of UMUT lands outside of commonly known reservation boundaries including but not limited to tribal trust lands that are outside of reservation boundaries. A state certification is not valid on these waters, and without a valid 401 certification, a permit is not valid.

For NWPs or projects that do require an individual 401 certification, a request for certification must follow the requirements outlined in Section 121.5 of EPA's final 401 regulation, effective September 11, 2020. Inquiries, pre-filing meeting requests and certification requests should be sent to [clarrick@utemountain.org](mailto:clarrick@utemountain.org). Suggested minimum information needed by UMUT is available by request. If minimum information is not included, the information will be requested after receipt of the certification request. UMUT may decide to Public Notice certification requests and offer the public an opportunity to request a public hearing on all individually requested certifications. This additional time should be considered in setting the reasonable time period for certifications.

If there are any questions or if any clarification is necessary please contact Colin Larrick, Water Quality Program Manager, at 970-564-5430 or [clarrick@utemountain.org](mailto:clarrick@utemountain.org)

Sincerely,



Scott Clow  
Environmental Programs Director  
Ute Mountain Ute Tribe



**Ute Mountain Ute Tribe Clean Water Act Section 401  
Water Quality Certification for the U.S. Corps of Engineers CWA Section 404  
2020 Nationwide Permits Reissuance**

This Certification applies to any potential point source discharges from potential projects authorized under the proposed re-issuance of the following U.S. Army Corps of Engineers CWA 404 Nationwide Permit (NWP) into waters of the United States that occur within the Ute Mountain Ute Reservation within the Albuquerque, Omaha and Sacramento Corps Districts: NWP 3, 4, 5, 6, 7, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 25, 27, 29, 30, 31, 32, 33, 34, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 48, 49, 50, 51, 52, 53, 54, C, and D.

Section 401(a)(1) of the Clean Water Act requires applicants for Federal permits and licenses that may result in discharges into waters of the United States to obtain certification that potential discharges will comply with applicable provisions of the CWA, including Sections 301, 302, 303, 306 and 307.

This Certification does not apply to the following NWPs: 1, 2, 8, 9, 10, 11, 24, 28, 35, A, and B. If any activity authorized by these listed NWPs may result in a discharge into a water of the United States, the Corps must seek CWA section 401 certification from the Ute Mountain Ute Tribe for discharges that occur in the boundaries of the Ute Mountain Ute Tribe within the Albuquerque, Omaha and Sacramento Corps Districts. In addition, this certification does not apply to NWPs applied "after-the-fact" (i.e., after the discharge has occurred) or to NWPs where a waiver on limits has been granted by the District or Division Engineer.

**General Information**

The general information provided in this section is intended to provide context for UMUT's certification decision and does not itself constitute a certification condition(s). The information in this section is being provided to help ensure applicants comply with the terms and conditions of the CWA § 401 certifications of the NWPs on applicable UMUT lands.

- The Applicant and applicants for projects authorized under the NWPs should obtain all other permits, licenses, and certifications that may be required by federal, state, or tribal authority.
- If a project is unable to meet the enclosed conditions, or if certification is denied for an applicable NWP, the Applicant may request an individual certification from UMUT. An individual certification request must follow the requirements outlined in 40 CFR 121.5 of EPA's CWA § 401 Certification Rule, effective September 11, 2020.
- Copies of this certification should be kept on the job site and readily available for reference.
- If the project is constructed and/or operated in a manner not consistent with the applicable NWP, general conditions, or regional conditions, the permittee may be in violation of this certification.
- UMUT representatives may inspect the authorized activity and any mitigation areas to determine compliance with the terms and conditions of the NWP. CWA Section 308(a).

UMUT is expressly waiving its authority to act on the CWA § 401 certification request for the following proposed NWP: **NWPs Waived (121.9(a)(1))**

4. Fish and Wildlife Harvesting, Enhancement, and Attraction Devices and Activities
22. Removal of Vessels
48. Commercial Shellfish Mariculture
54. Living Shorelines

### **NWPs Granted with Conditions (121.7(d)(2))**

CWA Section 401 certification is granted with the following conditions for NWPs 3, 5, 6, 7, 13, 14, 15, 18, 19, 20, 23, 25, 27, 30, 31, 32, 33, 36, 38, 41, 43, 45, 46, C, and E. UMUT has determined that any discharge authorized under these proposed NWPs will comply with water quality requirements, including applicable provisions of Sections 301, 302, 303, 306, and 307 of the Clean Water Act, and tribal regulatory requirements for point source discharges into waters of the United States, subject to the following conditions pursuant to Section 401(d).

**All conditionally certified NWPs, including those with additional permit-specific conditions, must comply with the following conditions:**

<b>Conditions Applicable to all NWPs</b>	<b>Why the condition is necessary to assure the proposed project will comply with water quality requirements</b>	<b>Citation that authorizes the condition</b>
<p>All applicants, including federal agencies, must notify UMUT's Tribal Environmental Department of the use of all NWPs for which certification has been granted prior to commencing work on the project.</p> <p>Notifications must include:</p> <ul style="list-style-type: none"> <li>• project location (lat. Long., exact point on map);</li> <li>• NWP that will be used and the specific activity that will be authorized under the NWP;</li> <li>• amount of permanent and temporary fills;</li> <li>• a short summary of the proposed activity, and all other federal, state, tribal or local permits or licenses required for the project;</li> <li>• complete contact information of both the applicant and contractor (name, name of the company or property if applicable, telephone, mobile, and email); and,</li> <li>• summary of best management practices that will be used.</li> </ul>	<p>Notification will ensure that UMUT is aware of all Corps-authorized activities potentially affecting Indian country lands. It also will ensure the Corps and UMUT can demonstrate that the NWP program has no more than minimal impacts to the aquatic environment, individually and cumulatively, and that the activities will not adversely impact cultural and historic uses of tribal waters.</p> <p>In order to ensure that UMUT has the opportunity to inspect the project prior to the onset of operations, the applicant must notify the tribal government in a timely manner of the status of the project construction.</p>	<p>CWA sections 301, 302, 303, 306, and 307<sup>1</sup></p> <p>CWA 308(a)</p> <p>40 CFR 121.11(a) Endnotes (ii-iv)</p>



- Notify UMUT at least 7 days before the completion of construction and operations begin.

Point source discharges may not occur: (1) in fens, bogs or other peatlands; (2) within 100 feet of the point of discharge of a known natural spring source; or (3) hanging gardens or (4) culturally sensitive waters.

Except as specified in the application, no debris, silt, sand, cement, concrete, oil or petroleum, organic material, or other construction related materials or wastes shall be allowed to enter into or be stored where it may enter into waters of the U.S.

Silt fences, straw wattles, and other techniques shall be employed as appropriate to protect waters of the U.S. from sedimentation and other pollutants.

Water used in dust suppression shall not contain contaminants that could violate water quality standards.

Erosion control matting that is either biodegradable blankets or loose-weave mesh must be used to the maximum extent practicable.

All equipment used in waters of the U.S. must be inspected for fluid leaks and invasive species prior to use on a project. All fluid leaks shall be repaired and cleaned prior to use or when discovered, or if the fluid leak can't be

This condition is necessary to ensure activities that may result in point source discharges into waters of the United States do not degrade these unique and difficult to replace wetland types, which play an importation role in maintaining water quality and hydrologic function in mountain and prairie ecoregions.

This condition is necessary to ensure water quality is not degraded by toxic pollutants in toxic amounts, raw materials, oil, grease, gasoline, or other types of fluids used to operate and maintain equipment used to complete the project.

This condition minimizes turbidity and sediment caused by construction activities, minimizes equipment contact with water (and potential for oil, gas, invasive species, etc. contamination), and allows for clean-up of potential spills before entering waters. It is necessary to ensure that water quality is not degraded, and biology of the waters are not negatively impacted by the project.

This condition is necessary to ensure water quality is not degraded by toxic material in toxic amounts, raw materials, oil, grease, gasoline, or other types of fluids used to operate and maintain equipment used to complete the project.

Condition is necessary to provide clarity on how to meet "appropriate soil erosion and sediment controls," as required by NWP's General Condition 12. Use of other "appropriate" measures is not prohibited, but the inclusion of this condition ensures that water quality impacts of dredged or fill material are minimized.

This condition is necessary to ensure water quality is not degraded by oil, grease, gasoline, or other types of fluids used to operate and maintain equipment used to complete the project. This condition helps protect the native

40 CFR 230 Subpart E; Ute Mountain (iv)

Endnotes (i-iv)

40 CFR 230.10(d); 40 CFR 230.71; Ute Mountain (iv)

Endnotes (i-iv)

40 CFR 230.10(d) and 230.72 Ute Mountain (iv)

40 CFR 230.10(d); 40 CFR 230.71; Endnotes (i-iv) Ute Mountain (iv)

40 CFR 230.10(d); 40 CFR 230.72 Ute Mountain (iv)

40 CFR 230.10(d); 40 CFR 230.74 Ute Mountain (iv)

<p>repaired, the equipment shall not be used on site. Equipment used in waters with the possibility of aquatic nuisance species infestation must be thoroughly cleaned before they are used on the project.</p> <p>Vegetation should be protected except where its removal is necessary for completion of the work. Locations disturbed by construction activities should be revegetated with appropriate native vegetation in a manner that optimizes plant establishment for the specific site. Revegetation may include topsoil replacement, planting, seeding, fertilization, liming, and weed-free mulching, as necessary. Where practical, stockpile weed-seed-free topsoil and replace it on disturbed areas. All revegetation materials, including plants and plant seed shall be on site or scheduled for delivery prior to or upon completion of the earth moving activities.</p> <p>Activities may not result in any unconfined discharge of liquid cement into waters of the U.S. Grouting riprap must occur under dry conditions with no exposure of wet concrete to the waterbody.</p>	<p>biology of the impacted waters by preventing the spread of invasive or nuisance species.</p>	
<p>Activities that may result in a point source discharge shall occur during seasonal low flow or no flow periods to the extent practicable.</p>	<p>Condition is necessary to provide the project proponent with clarity on what meets the requirement for appropriate revegetation as required by NWP's General Condition 13. Revegetation maintains and improves water quality because riparian vegetation acts as buffer to reduce the amount of sediment and pollutants that enter waterways. Native vegetation, because it is adapted to local conditions (e.g., soil types and temperature) provided this function most efficiently. Native vegetation also protects the biology of waters by providing habitat for semi-aquatic organisms and other organisms that are a food source to aquatic life.</p> <p>This condition is necessary to ensure water quality is not degraded and the biology of the waters are not negatively impacted by toxic compounds.</p>	<p>40 CFR 230.10(d); 40 CFR 230.75; Ute Mountain (iv)</p>
<p>The placement of material (discharge) for the construction of new dams is not certified, except for stream restoration projects.</p>	<p>This condition minimizes turbidity and sediment caused by construction activities, minimizes equipment contact with water (and potential for oil, gas, invasive species, etc. contamination), and allows for clean-up of potential spills before entering waters. It is necessary to ensure that water quality is not degraded, and biology of the waters are not negatively impacted by the project.</p> <p>This condition is necessary to ensure impacts to water quality as a result of flow alterations are minimized to the maximum extent practicable, as required by NWP's General Condition 8.</p>	<p>40 CFR 230.10(d); 40 CFR 230.71; CWA 307 ("No toxics in toxic amounts") Ute Mountain (iv)</p> <p>40 CFR 230.10(d); 40 CFR 230.72(d); 40 CFR 230.23; 40 CFR 230.24; Ute Mountain (iv)</p> <p>40 CFR 230.23; 40 CFR 230.24; Ute Mountain (iv)</p>

**\*\*SEE NEXT PAGE FOR LIST OF NWPS GRANTED WITH CONDITIONS\*\***

**NWPs Granted with Permit-Specific Conditions in addition to the Conditions listed above. (121.7(d)(2)):**

<b>NWP #</b>	<b>Permit-Specific Conditions</b>	<b>Why the condition is necessary to assure the proposed project will comply with water quality requirements</b>	<b>Citation that authorizes the condition</b>
3. Maintenance	<p>1) No more than 25 cubic yards of new or additional riprap may be placed to protect the structure or fill;</p> <p>2) Bridge replacements must span the bankfull width and/or the ordinary highwater mark of the affected waters of the U.S.</p> <p>3) Fill or dredged material shall not result in an increase in land contour height beyond the original dimensions for the repair of low water crossings, or loss of stream cross section dimensions.</p> <p>4) Silt and sediment removal associated with low water crossings shall not exceed 50 linear feet.</p> <p>5) Silt and sediment removal associated with bridge crossings shall not exceed 100 linear feet.</p>	<p>1) The placement of new or additional riprap without limiting the amount of impacts authorized could result in more than minimal adverse effects on water quality. Limiting the placement of additional riprap to no more than 25 cubic yards will help ensure that the placement provides localized erosion control without causing undesirable consequences to water quality and degradation of physical habitat.</p> <p>2) The placement of a bridge/structure within bankfull width and/or the ordinary high water mark of a water of the U.S. would alter the hydrologic characteristics of the waterbody which could lead to an increased erosional force, scour around the bridge/structure during bankfull flows, high sediment loads to the waterbody, abandonment of the primary channel, and undermining of the structure itself.</p> <p>3) The discharge of dredged or fill material which alters the contours of a waterbody and/or its riparian zone can result in the loss or change of breeding and nesting areas, escape cover, travel corridors, and preferred food sources for resident and transient wildlife species associated with the aquatic ecosystem.</p> <p>Without a linear foot limit associated with silt and sediment removal in waters of the U.S., excess removal can result in varying degrees of change in the complex</p>	<p>40 CFR 230.10(d); 40 CFR 230.73; 40 CFR 230.75 Ute Mountain (iv)</p>



7. Outfall  
Structures

- 1) Construction of the outfall structure shall be placed at the streambed elevation and, at a minimum, the pipe should be sized to prevent high pressure discharge of stormwater.
- 2) Outfall structures shall not be constructed in wetlands.
- 3) Controls shall be put in place to stabilize all areas of the bed and bank around and adjacent to the outfall structure and associated intake structures that may be affected by outfall or stream flows, respectively.
- 4) Structures shall not result in a loss of waters of the U.S. (e.g. tile systems).

physical, chemical, and biological characteristics. Excess silt and sediment removal may alter the direction or velocity of water flow or otherwise change the dimensions of a water body which can result in adverse changes to structure and dynamics of aquatic communities, erosion rates, and increases in suspended particulates. This justification applies to conditions 4 and 5.

This justification covers condition 1 and 2. By specifying conditions on outfalls sizing, placement, and stabilization, these measures will help ensure that outfall structures are constructed such that they provide localized erosion control at the point(s) of discharge while minimizing habitat degradation and undesirable downstream impacts.

3) Erosion from outfall structures can be caused by several factors, such as uncontrolled stormwater runoff, inadequate energy dissipation structures, nick point migration, poor slope stabilization, or extreme storm events that exceed design capacities. Without stabilization controls in place, construction of outfall structures can lead to changes in erosion and deposition rates, increases in suspended particulates in the waterbody, and undermining of the outfall structure itself.

4) Structures that result in a loss of waters of the U.S. can degrade and/or eliminate aquatic habitat and adversely affect bottom-dwelling organisms at the site by smothering immobile forms or forcing mobile forms to migrate.

These conditions are necessary to ensure that physical habitat and hydrologic characteristics of waters are not

Ute Mountain  
(iv)  
303(a);  
40 CFR 230.7;  
40 CFR 230.10;  
40 CFR  
230.10(d); 40  
CFR 230.73; 40  
CFR 230.70

degraded; maintain the habitat and biology of the waters and ensure the hydrogeomorphology is not negatively impacted by the project.

13. Bank  
Stabilization

1) Activities shall use of native vegetation or other bioengineered design techniques (e.g. willow plantings, root wads, large woody debris, etc.) or a combination of hard-armoring (e.g. rock) and native vegetation or bioengineered design techniques. Artificial soil stabilizing material (e.g. mulch, matting, netting, etc.) shall be used to reduce soil erosion. These materials, to include all plants and plant seed, shall be on site or scheduled for delivery prior to or upon completion of the earth moving activities. Sediment control measures shall be maintained in good working order at all times.

2) The slopes of disturbed banks should be configured to mimic a stable reach of the same stream within ½ mile in either direction of the project and not reduce the bottom width of the stream.

3) If flow conditions dictate the use of hardened structures, only appropriately sized angular rock may be used. Soil cement, concrete, grouted riprap, etc. may not be used.

This justification applies to conditions 1-3. While effective at preventing localized erosion, hard armoring used as streambank stabilization can have a number of negative downstream effects such as increasing flow velocities, impeding hydrologic interaction with the floodplain, and degrading physical habitat. Specifying the methods and techniques which can be used under NWP 13 will help prevent habitat degradation and minimize negative downstream impacts while also achieving localized streambank stabilization and erosion control.

Ute Mountain  
(iv)  
303(a)  
40 CFR 230.7;40  
CFR 230.10(d);  
40 CFR 230.72

14. Linear  
Transportation  
Projects

1) Stormwater from the construction and operation of these projects must be routed into constructed runoff water quality control systems (e.g. sediment basins, wet ponds, etc.)

This justification applies to conditions 1 - 3. Constructed water quality control systems sequester sediments and other pollutants from runoff, as well as reduce velocity of those flows, prior to entry into waters of the United States. Maintaining natural stream bottom widths and elevations limits increases in streamflow velocity and

Ute Mountain  
(iv)  
303(a)  
40 CFR 230.7  
and 230.10

	2) Affected streambanks must be sloped such that the stream bottom width is not reduced, and bottom elevations are restored to original elevations. In general, stream bank slopes should not be steeper than 3:1 unless there is a compelling reason.	reduces the potential for streambed scouring and bank incising. Limiting bank slope reduces the potential for erosion, undercutting and slumping, which add sediment to streams. Perpendicular stream crossings minimize the length of stream bed and bank impacts for a project. Collectively, these controls will ensure that physical habitat and hydrologic characteristics of waters are not degraded, will maintain the habitat and biology of the waters and will ensure the hydrogeomorphology is not negatively impacted by the project.	
	3) Crossings must be placed as close to perpendicular to the water course as possible.		
15. Bridges	1) Stormwater from the construction and operation of these projects (including runoff from bridge decks) must be routed into constructed runoff water quality control systems (e.g. sediment basins, wet ponds, etc.)	<u>This justification applies to conditions 1 - 3.</u> Constructed water quality control systems sequester sediments and other pollutants from runoff, as well as reduce velocity of those flows, prior to entry into waters of the United States. Maintaining natural stream bottom widths and elevations limits increases in streamflow velocity and reduces the potential for streambed scouring and bank incising. Limiting bank slope reduces the potential for erosion, undercutting and slumping, which add sediment to streams. Perpendicular stream crossings minimize the length of stream bed and bank impacts for a project. Collectively, these controls will ensure that physical habitat and hydrologic characteristics of waters are not degraded, will maintain the habitat and biology of the waters and will ensure the hydrogeomorphology is not negatively impacted by the project.	Ute Mountain (iv) 303(a) 40 CFR 230.7; 40 CFR230.10(d); 40 CFR 230.72
	2) Affected streambanks must be sloped such that the stream bottom width is not reduced, and bottom elevations are restored to original elevations.		
	3) Crossings must be placed as close to perpendicular to the watercourse as possible.		
	4) Bridge decks must be designed such that they do not drain directly into the waterbody.		
	5) Bridges must span the bankfull width and/or ordinary high water mark of the affected waters of the U.S. Bridges may not impair flow under normal circumstances, should not produce eddies or unintended scour holes and should be designed to prevent accumulation of sediment that may block flows.	4) Drainage directly from the bridge decks may cause erosion, and introduce additional pollutants, such as oil, gas, sediment, and toxics. Directing bridge deck drainage into constructed runoff water quality control systems will help prevent erosion and keep pollutants from directly entering the waterway.	

		5) The placement of a bridge/structure within bankfull width and/or the ordinary high water mark of a Water of the U.S. would alter the hydrologic characteristics of the waterbody which could lead to an increased erosional forces, scour around the bridge/structure during bankfull flows, high sediment loads to the waterbody, abandonment of the primary channel, and undermining of the structure itself.	
19. Minor Dredging	Dredged or fill materials must be placed in uplands and controlled such that it cannot return to waters of the U.S. Dredged or fill material may not be placed on temporary islet, islands, sandbars, landmass or other area of sediment accumulation within the banks of a stream, shore of lake, edge of wetland or other type of waterbody, unless the vegetation and geomorphology signify a long term stable configuration (e.g. areas of accumulation are not formed from temporary situations such as drought conditions or temporary upstream reservoir release conditions).	<p>Placement of dredged or fill material in these locations may be susceptible to being washed away by high flows, which would contribute to sedimentation and potential conveyance of pollutants downstream.</p> <p>This condition is necessary to ensure that physical habitat and hydrologic characteristics of waters are not degraded; maintain the habitat and biology of the waters and ensure the hydrogeomorphology is not negatively impacted by the project.</p>	Ute Mountain (iv) 40 CFR 230.10(d); 40 CFR 230.70
27. Aquatic Habitat Restoration	Activities that may result in a discharge into waters of the United States shall not result in conversion of one habitat type to another (e.g. wetlands to open water).	<p>Aquatic habitat restorations that convert from one habitat type to another can alter the functions and services provided by the existing resources resulting in a functional loss.</p> <p>This condition is necessary to ensure that physical habitat and hydrologic characteristics of waters are not degraded; maintain the habitat and biology of the waters and ensure the hydrogeomorphology is not negatively impacted by the project.</p>	Ute Mountain (iv) 40 CFR 230.10(d); 40 CFR 230.75

43. Stormwater Management Facilities	Certification is granted with conditions only for replacement and repair activities that impact (e.g., fill, relocate, realign or straighten) no more than 300 LF of stream or 1/10 acre of waters of the U.S.	Activities with more than 300 LF or 1/10 acre of waters of the U.S. of stream impact could result in more than minimal adverse environmental effects to water quality.  This condition is necessary to ensure that water quality is not degraded, the biology of the waters are not negatively impacted by the project, and that no toxic compounds in toxic amounts will be used.	40 CFR 230.10(d); 40 CFR 230.73; 40 CFR 230.75; Ute Mountain (iv)
C. Electric Utility Line and Telecom Activities	Construction activities shall not impact (e.g., fill, relocate, realign or straighten) more than 300 LF of stream for a single and complete project.	Activities with more than 300 LF of stream impact could result in more than minimal adverse environmental effects to water quality.  This condition is necessary to ensure that physical habitat and hydrologic characteristics of waters are not degraded; maintain the habitat and biology of the waters and ensure the hydrogeomorphology is not negatively impacted by the project.	CWA sections 301, 302, 303, 306, and 307 (see endnote i); Ute Mountain (iv)
E. Water Reclamation and Reuse	Activities shall not impact (e.g., fill, relocate, realign or straighten) more than 300 LF of stream channel for a single and complete project.	Activities with more than 300 LF of stream impact could result in more than minimal adverse environmental effects to water quality.  This condition is necessary to ensure that physical habitat and hydrologic characteristics of waters are not degraded; maintain the habitat and biology of the waters and ensure the hydrogeomorphology is not negatively impacted by the project.	CWA sections 301, 302, 303, 306, and 307 (see endnote i); Ute Mountain (iv)

### **NWPs Denied (121.7(e)(2))**

UMUT has determined that the discharges from the following NWPs will not comply with water quality requirements. Therefore, CWA Section 401 certification is denied, and applicants must apply for an individual water quality certification. Denials apply to all UMUT lands.



*\*\*\* Reviewer NOTE: For readability of the table we have removed the column with the heading, "The following water quality data or information would be needed to assure that the range of discharges from potential projects will comply with water quality requirements." This information follows the table and is the same for all NWP's where certification is denied. \*\*\**

<b>NWP #</b>	<b>Water quality requirement with which discharges that could be authorized by the general license or permit will not comply</b>	<b>Brief statement explaining why discharges that could be authorized by the general license or permit will not comply with this water quality requirement</b>
12. O&G Pipeline Activities	CWA sections 301, 302, 303, 306, and 307 (see endnote i); 40 CFR 230 Subpart C Section 311 and implementing regulations  Ute Mountain (iv)	The activities permitted under this NWP will not comply with this water quality requirement because there are no limits on the linear foot impacts to streams. Without the 300 linear foot limit in place, discharges permitted under this NWP would allow many thousands of linear feet of impacts resulting in more than minimal adverse effects to water quality individually and cumulatively.  In addition, the removal of the PCN requirement for activities that involve mechanized land clearing in forested wetlands does not allow the evaluation of the functional loss from conversion of wetland type from a forested wetland, which may modify habitat and alter water levels beyond normal water fluctuations, inhibiting the existing uses of the waterbody.
16. Return Water from Upland Contained Disposal Areas	40 CFR § 230.23 307 toxics  Ute Mountain (iv)	Return water from upland contained disposal areas can contain debris, sediment, and other pollutants which would be discharged into aquatic resources under this NWP. The return water itself can modify current patterns and dimensions of a waterbody while any debris or sediment in the return water can result in adverse impacts through sedimentation and oxygen depletion from nutrient adsorption of suspended material.
17. Hydropower Projects	40 CFR 230.23 40 CFR 230.24  Ute Mountain (iv)	Discharges of dredged or fill material associated with hydropower projects having less than 10,000 kW of total generating capacity can alter the normal water-level fluctuation pattern of an area, resulting in prolonged periods of inundation, exaggerated extremes of high and low water, or a static, nonfluctuating water level. These alterations can change salinity patterns, alter erosion or sedimentation rates, alter water temperatures.
21. Surface Coal Mining Activities	CWA sections 301, 302, 303, 306, and 307 (see endnote i); 40 CFR 230 Subpart C, Subpart D  Ute Mountain (iv)	The activities permitted under this NWP will not comply with this water quality requirement because there are no limits on the linear foot impacts to streams. Without the 300 linear foot limit in place, discharges permitted under this NWP would allow many thousands of linear feet of impacts resulting in more than minimal adverse water quality effects individually and cumulatively.

		Discharges associated with surface coal mining activities can result in varying degrees of change in the complex physical, chemical, and biological characteristics of the substrate. These changes can adversely affect the level of water quality such that existing instream water uses will no longer be maintained and protected.
24. Indian Tribe or State Administered Section 404 Programs	CWA 404(g) implementing regulations	
29. Residential Developments	CWA sections 301, 302, 303, 306, and 307 (see endnote i); 40 CFR 230 Subpart C, Subpart D  Ute Mountain (iv)	The activities permitted under this NWP will not comply with this water quality requirement because there are no limits on the linear foot impacts to streams. Without the 300 linear foot limit in place, discharges permitted under this NWP would allow many thousands of linear feet of impacts resulting in more than minimal adverse water quality effects individually and cumulatively.  Discharges associated with residential developments under NWP 29 can result in significant losses to ecosystem services provided by existing aquatic resources. Adverse impacts may result from changes in water levels, flow, chemical content, substrate characteristics, or salinity and can result in losses to important breeding and nesting areas, food sources, and travel corridors for aquatic wildlife. Discharges of dredged or fill material associated with cranberry production can alter the normal water-level fluctuation pattern of an area, resulting in prolonged periods of inundation, exaggerated extremes of high and low water, or a static, nonfluctuating water level. These alterations can change salinity patterns, alter erosion or sedimentation rates, and alter water temperatures which can alter or destroy communities and populations of aquatic animals and vegetation, induce populations of nuisance organisms, modify habitat, reduce food supplies, restrict movement of aquatic fauna, destroy spawning areas, and change surrounding areas.
34. Cranberry Production	40 CFR 230.23 40 CFR 230.24  Ute Mountain (iv)	
37. Emergency Watershed	Ute Mountain (iv)	

Protection and Rehabilitation		
39. Commercial Development	CWA sections 301, 302, 303, 306, and 307 (see endnote i); 40 CFR 230 Subpart C, Subpart D  Ute Mountain (iv)	<p>The activities permitted under this NWP will not comply with this water quality requirement because there are no limits on the linear foot impacts to streams. Without the 300 linear foot limit in place, discharges permitted under this NWP would allow many thousands of linear feet of impacts resulting in more than minimal adverse water quality effects individually and cumulatively.</p> <p>Discharges of dredged or fill material associated with commercial development activities permitted under NWP 39 can result in degradation of water quality such that existing instream water uses are no longer maintained. These activities can result in changes to the physical, chemical, and biological characteristics of the aquatic ecosystem that may result in water quality which does not support the propagation of fish, shellfish, and wildlife and recreation in and on the water. The activities permitted under this NWP will not comply with this water quality requirement because there are no limits on the linear foot impacts to streams. Without the 300 linear foot limit in place, discharges permitted under this NWP would allow many thousands of linear feet of impacts resulting in more than minimal adverse water quality effects individually and cumulatively.</p>
40. Agricultural Activities	CWA sections 301, 302, 303, 306, and 307 (see endnote i); 40 CFR 230 Subpart C, Subpart D  Ute Mountain (iv)	<p>Agricultural activities under NWP 40 which may result in the discharge of dredged or fill material can change the material chemistry and physical characteristics of a waterbody through the introduction of chemical constituents in suspended or dissolved form. These changes may reduce or eliminate the suitability of waterbodies for aquatic organisms, human consumption, or recreation. The activities permitted under this NWP will not comply with this water quality requirement because there are no limits on the linear foot impacts to streams. Without the 300 linear foot limit in place, discharges permitted under this NWP would allow many thousands of linear feet of impacts resulting in more than minimal adverse water quality effects individually and cumulatively.</p>
42. Recreational Facilities	CWA sections 301, 302, 303, 306, and 307 (see endnote i); 40 CFR 230 Subpart C, Subpart D  Ute Mountain (iv)	<p>Discharges of dredged or fill material associated with recreational facilities permitted under NWP 42 can result in degradation of water quality such that existing instream water uses are no longer maintained. These activities can result</p>



44. Mining Activities	CWA sections 301, 302, 303, 306, and 307 (see endnote i); 40 CFR 230 Subpart C, Subpart D  Ute Mountain (iv)	<p>in changes to the physical, chemical, and biological characteristics of the aquatic ecosystem that may result in water quality which does not support the propagation of fish, shellfish, and wildlife and recreation in and on the water. The activities permitted under this NWP will not comply with this water quality requirement because there are no limits on the linear foot impacts to streams. Without the 300 linear foot limit in place, discharges permitted under this NWP would allow many thousands of linear feet of impacts resulting in more than minimal adverse water quality effects individually and cumulatively.</p> <p>Discharges associated with mining activities may result in an increase in turbidity to the extent which reduces the water quality necessary to support the propagation of fish, shellfish, wildlife, and recreation in and on the water. The biological and chemical context of the suspended material may also react with the dissolved oxygen in the water which can result in oxygen depletion. Toxic compounds absorbed or adsorbed to fine-grained particulates in suspended material may become biologically available to organisms either in the water column or on the substrate. Discharges from these activities may increase the availability of contaminants in the aquatic ecosystem which may lead to the bioaccumulation of such contaminants in wildlife.</p>
49. Coal Remining	40 CFR 230.23 40 CFR 230.24  Ute Mountain (iv)	<p>Discharges associated with the remining and reclamation of lands that were previously mined for coal may result in an increase in turbidity to the extent which reduces the water quality necessary to support the propagation of fish, shellfish, wildlife, and recreation in and on the water. The biological and chemical context of the suspended material may also react with the dissolved oxygen in the water which can result in oxygen depletion. Toxic compounds absorbed or adsorbed to fine-grained particulates in suspended material may become biologically available to organisms either in the water column or on the substrate.</p>
50. Underground Coal Mining	CWA sections 301, 302, 303, 306, and 307 (see endnote i); 40 CFR 230 Subpart C, Subpart D  Ute Mountain (iv)	<p>The activities permitted under this NWP will not comply with this water quality requirement because there are no limits on the linear foot impacts to streams. Without the 300 linear foot limit in place, discharges permitted under this NWP would allow many thousands of linear feet of impacts resulting in more than minimal adverse water quality effects individually and cumulatively.</p>

Discharges associated with underground coal mining activities may result in an increase in turbidity to the extent which reduces the water quality necessary to support the propagation of fish, shellfish, wildlife, and recreation in and on the water. The biological and chemical context of the suspended material may also react with the dissolved oxygen in the water which can result in oxygen depletion. Toxic compounds absorbed or adsorbed to fine-grained particulates in suspended material may become biologically available to organisms either in the water column or on the substrate. Discharges from these activities may increase the availability of contaminants in the aquatic ecosystem which may lead to the bioaccumulation of such contaminants in wildlife.

51. Land-based  
Renewable Energy      CWA sections 301, 302, 303, 306, and 307  
                                  (see endnote i); 40 CFR 230 Subpart C,  
                                  Subpart D

Ute Mountain (iv)

The activities permitted under this NWP will not comply with this water quality requirement because there are no limits on the linear foot impacts to streams. Without the 300 linear foot limit in place, discharges permitted under this NWP would allow many thousands of linear feet of impacts resulting in more than minimal adverse water quality effects individually and cumulatively.

Land-based renewable energy activities may result in an increase in suspended particulates entering waterbodies as a result of land runoff and direct dredging or filling. Suspended particulates may remain in the water column for varying amounts of time, reducing light penetration and lowering photosynthesis rates for aquatic vegetation.

52. Water-based  
Renewable Energy      CWA sections 301, 302, 303, 306, and 307  
                                  (see endnote i); 40 CFR 230 Subpart C,  
                                  Subpart D

Ute Mountain (iv)

The activities permitted under this NWP will not comply with this water quality requirement because there are no limits on the linear foot impacts to streams. Without the 300 linear foot limit in place, discharges permitted under this NWP would allow many thousands of linear feet of impacts resulting in more than minimal adverse water quality effects individually and cumulatively.

Discharges associated with water-based renewable resources can have adverse impacts on water-related recreation including both consumptive and non-consumptive uses. Impacts from these activities may impair or water use by

53. Removal of Low Head Dams	40 CFR 230.23 40 CFR 230.24	changing turbidity, increasing suspended particulates, altering water temperature, changing habitat, and other changes to the aquatic ecosystem. The removal of low head dams in the arid and semi-arid west, where natural recovery can be slow, many times requires active restoration to achieve a net increase in ecological functions and services. Otherwise, the removal of the dam can lead to adverse impacts including significant increases in suspended particulate levels and sedimentation downstream which may cause oxygen depletion and destruction of habitat.
	Ute Mountain (iv)	
D. Utility Line Activities for Water and other Substances	40 CFR 230.20 40 CFR 230.23 40 CFR 230.24	Discharges resulting from the numerous activities permitted under this NWP may directly impact bottom-dwelling organisms by limiting aquatic organism movement, by smothering immobile forms, or by forcing mobile forms to migrate to potentially unsuitable habitat. Erosion, slumping, or lateral displacement of surrounding bottom can adversely affect areas of the substrate outside of discharge location by changing or destroying habitat. These changes may degrade water quality such that the waters no longer support the propagation of fish, shellfish, wildlife, and recreation in and on the waterbody.
	Ute Mountain (iv)	

<sup>i</sup> CWA sections 301, 302, 303, 306, and 307 are listed in CWA section 401(a)(1) and, therefore, those sections and federal regulations implementing those sections can be considered water quality requirements and provide a legal basis for certification grants, denials or conditions. Section 303 and EPA's implementing regulations at Part 131 establish "existing uses" as "the absolute floor of water quality in all waters of the United States." 48 Fed. Reg. 51,400, 51,403 (Nov. 8, 1983). Existing uses are "those uses actually attained in the water body on or after November 28, 1975, *whether or not they are included in the water quality standards.*" 40 C.F.R. § 131.3(e) (emphasis added). As a result, States are prohibited from removing designated uses from a waterbody segment if they are existing uses unless establishing a use with even more stringent criteria, 40 C.F.R. § 131.10(h), and existing instream water uses and the level of water quality necessary to protect the existing uses shall be maintained and protected even if degradation is allowed under a State antidegradation policy, 40 C.F.R. § 131.12(a)(1). As a result, regardless of what water quality standards may be applicable to a water of the US, no discharge may be authorized under the CWA that would be so extensive as to change or destroy an existing use of that waterbody. Additionally, Section 404 is incorporated by reference into section 401(a)(1) and 401(d) by virtue of section 301(a), which prohibits the discharge of any pollutant by any person "[e]xcept as in compliance with this section and section[] . . . 404 of this title..." Section 404(a) authorizes the permitting of discharges of dredge or fill material "into the navigable waters at specified disposal sites." Under Section 404(b), those sites must be specified "through the application of guidelines developed by the Administrator, in conjunction with the Secretary." These guidelines, the CWA 404(b)(1) Guidelines, are contained at 40 CFR Part 230, establish

requirements for all permitted Section 404 discharges, including a requirement that such discharges must comply with all State water quality standards, 40 C.F.R. § 230.10(b)(1) & (2).

<sup>ii</sup> CWA - 40 CFR § 230 Subpart C - Potential Impacts on Physical and Chemical Characteristics of the Aquatic Ecosystem

<sup>iii</sup> CWA - 40 CFR § 230 Subpart D - Potential Impacts on Biological Characteristics of the Aquatic Ecosystem

<sup>iv</sup> Water Quality Standards For Surface Waters of the Ute Mountain Ute Indian Reservation – Section 4 Anti-degradation Policy, Section 5. Narrative Water Quality Criteria, Section 6. Narrative Biological Criterion, Section 12 Designated Uses and Criteria

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